14-1516

No. ____

In the
Supreme Court of the United States

STEPHEN DUNCAN, Warden,
PETITIONER,

v.

LAWRENCE OWENS,
RESPONDENT.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

No clearly established precedent of this Court holds that it violates the Constitution for a finder of fact to infer a criminal defendant's motive when the motive is a non-element of the offense and is not directly established by the evidence at trial. Respondent claimed that the judge at his bench trial made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld respondent's conviction, holding that the trial court's speculation regarding motive was harmless. The Seventh Circuit overturned respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, and that the error was not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

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PETITION FOR A WRIT OF CERTIORARI

Stephen Duncan, Warden of the Lawrence Correctional Center in Sumner, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-10a) is reported at 781 F.3d 360. The memorandum opinions of the United States District Court for the Northern District of Illinois denying relief (App. 11a-55a (denying habeas relief on respondent's ineffective assistance of counsel claim and declining to issue a certificate of appealability (CA) on all claims) & App. 56a-90a (denying habeas relief in part, including on the claim at issue in the present application)) are unpublished but are reported at 2014 WL 539125 and 2012 WL 1416432. The order of the Supreme Court of Illinois denying leave to appeal on postconviction appeal (App. 91a) is reported at 955 N.E. 2d 477 (Table) (Ill. 2011). The unpublished opinion of the Illinois Appellate Court affirming respondent's judgment of conviction on postconviction appeal (App. 92a-95a) is unreported. The order of the Supreme Court of Illinois denying leave to appeal on direct appeal (App. 96a) is reported at 788 N.E. 2d 733 (Table) (Ill. 2003). The unpublished opinion of the Illinois Appellate Court affirming respondent's

judgment of conviction on direct appeal (App. 97a-129a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 23, 2015. App. 1a-10a. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT

The Seventh Circuit's decision in this case violates both Congress's prohibition on habeas relief in the absence of clearly established precedent of this Court supporting the defendant's claim, 28 U.S.C. § 2254(d)(1), and this Court's repeated admonitions that the lower courts comply with this requirement, *see, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (per curiam); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (reversing Seventh Circuit); *Carey v. Musladin*, 549 U.S. 70, 77 (2006); *see also Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam) (reversing Seventh Circuit and focusing on "unreasonable application" prong of § 2254(d)). The decision below should be reversed, either summarily or after briefing and argument.

1. On November 8, 2000, following a bench trial in the Circuit Court of Cook County, Illinois, respondent Lawrence Owens was convicted of first degree murder for beating Ramon Nelson to death with a baseball bat (or something similar) outside a liquor store in Markham, Illinois. App. 97a. Owens was identified by two eyewitnesses. App. 103a, 107a. Announcing its judgment, the trial court stated:

> I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [respondent] knew he was a drug dealer. [Respondent] wanted to

> knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

App. 110a. The court sentenced respondent to twenty-five years of imprisonment. *Id.*

2. On direct appeal, respondent argued that the above-quoted remarks established that the court made improper "extrajudicial" findings regarding respondent's motive and based its finding of guilt on evidence not introduced at trial. App. 98a. Motive is not an element of first degree murder in Illinois, *see People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966), and the trial evidence did not address whether respondent knew the victim or knew that he was a drug dealer. The Illinois Appellate Court affirmed respondent's conviction, holding that the trial court's inference regarding respondent's motive was harmless. App. 120a. Respondent renewed his claim in a petition for leave to appeal to the Illinois Supreme Court, which the court denied in April 2003. App. 96a.

3. In December 2008, while his state collateral challenge was pending, respondent filed a petition for habeas corpus under 28 U.S.C. § 2254, arguing, in part, that the trial court had made improper "extrajudicial" findings regarding his motive and thus based its finding of guilt on evidence not introduced at trial. App. 57a. In April 2012, the district court ordered an evidentiary hearing on an unrelated ineffective assistance of counsel claim and denied respondent's other claims. App. 88a. With regard to the "extrajudicial" findings claim, the district court

held that respondent failed to identify "any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way." App. 76a. The district court also held that even if respondent could identify any Supreme Court precedent violated by the trial court's inference as to motive, the state appellate court's harmless error finding was a reasonable application of *Chapman v. California*, 368 U.S. 18 (1967). App. 76a-77a. Following a March 2013 evidentiary hearing, the district court denied habeas relief on respondent's ineffective assistance of counsel claim and declined to issue a CA. App. 54a. The Seventh Circuit granted a CA limited to the question of whether respondent's due process rights were violated because the trial judge relied on "extra-record facts" in determining respondent's guilt.

4. On March 23, 2015, the appellate panel issued its opinion granting respondent habeas relief under 28 U.S.C. § 2254. App. 10a. The Seventh Circuit held that the trial judge's inference about motive violated respondent's right to have his guilt adjudicated based solely on the evidence introduced at trial, and that the error was not harmless under the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Id.*

The Seventh Circuit stated that "only clearly established violations of a defendant's constitutional rights permit [the court] to reverse a state court decision challenged in a federal habeas corpus proceeding." App. 9a-10a. The Seventh Circuit then granted habeas relief, despite acknowledging that "we know of no case identical to this one," but stating that

"identity can't be required." 10a. Citing cases from this Court in which the fact-finder was exposed to information or influences other than properly introduced evidence of defendant's guilt, the Seventh Circuit concluded that the state trial judge's inference as to respondent's motive violated respondent's "right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial." *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's published decision defies AEDPA and the many decisions of this Court establishing and reaffirming that clearly established Supreme Court precedent is required to support a grant of habeas relief.

1. Habeas relief is not permitted under § 2254(d)(1) unless a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. *See Davis v. Ayala*, 576 U.S. ___, slip. op. at 11 (2015) (state court decision holding a constitutional claim harmless constituted adjudication on the merits, and accordingly, habeas relief could not be granted unless state court's rejection of claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent). In discussing what law is clearly established enough to support habeas relief, this Court has repeatedly "cautioned the lower courts against 'framing [its] precedents at [] a high level of generality.'" *Smith*, 135 S. Ct. at 4 (2014) (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam)). The Seventh Circuit failed to abide by these requirements in this case.

2. None of the cases that the Seventh Circuit relied on provides the clearly established precedent of this Court that is necessary for habeas relief. More specifically, no case supports respondent's claim that because no evidence directly established the trial court's inference as to his motive, which was not an element of his crime, his rights were violated. Instead,

the cases on which the Seventh Circuit relied involved juries that were exposed to prejudicial and improper information or influences from which guilt could be inferred.

These cases are inapposite. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, *see* App. 10a, this Court held that the right to a fair trial was violated where the prosecution invited the jury to infer defendant's guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. But unlike the defendant in *Taylor*, not only did respondent have a bench trial, but the State did not invite the trial judge to infer respondent's guilt from any improper basis. Indeed, respondent has never suggested that the trial judge relied on any information beyond the properly introduced trial evidence to find the elements of first degree murder.

The Seventh Circuit's reliance on *Estelle v. Williams*, 425 U.S. 501 (1976), *see* App. 10a, is similarly misplaced. *Williams* held that the right to a fair trial was violated where the defendant was compelled to appear before the jury in prison attire. 425 U.S. at 512. But again, respondent has never argued that any such prejudicial factor influenced the verdict in this case.

The final case of this Court on which the Seventh Circuit relied, *Holbrook v. Flynn*, 475 U.S. 560 (1986), *see* App. 10a, is even more inapposite. There, this Court held that the right to a fair trial was *not* violated

by the presence of additional, uniformed security personnel in the courtroom. 475 U.S. at 572. *Flynn* thus offers no support for respondent's claim.

In sum, so long as the State's evidence is sufficient to establish the elements of the crime and there is no improper influence on the fact-finder's decision-making process, no case relied on by the Seventh Circuit, and no other precedent of this Court, holds that due process is violated when the trier of fact infers a theory of the case that, while consistent with the evidence presented, also goes beyond it.

3. The Seventh Circuit pointed to two of its own decisions, *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009), and *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006), as clearly establishing the legal merits of respondent's claim. App 10a. But circuit precedent cannot satisfy AEDPA's requirement of clearly established law. *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012). Nor can a circuit court derive clearly established law by "refin[ing] or sharpen[ing] a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1451 (2013) (per curiam); *see also Smith*, 135 S. Ct. at 4 (quoting *Rodgers*). *Moore* and *Garcia* are thus irrelevant to the § 2254(d) analysis.

Even if reliance on Seventh Circuit precedent were appropriate, *Moore* and *Garcia* do not support, much less clearly establish, the legal merits of respondent's claim. In *Moore*, the court recited the general principle that "[g]uilt beyond a reasonable doubt cannot be

premised on pure conjecture," 572 F.3d at 341, while *upholding* a conviction in which the jury had to infer a variety of connections between different pieces of evidence and disregard other evidence in order to accept the government's theory of the case, *id.* at 337-41. Likewise, the *Garcia* court uncontroversially observed that the presumption of innocence means that a jury cannot be "encouraged (or allowed) to consider facts which have not been received in evidence." 439 F.3d at 367. But *Garcia* also upheld the conviction over the defendant's challenge to expert testimony that, he claimed, encouraged an inappropriate inference of his guilt. *Id.* at 368 (distinguishing *Taylor*, 436 U.S. at 484-90). Neither case supports respondent's claim.

4. Perhaps recognizing that the lack of clearly established Supreme Court precedent is an insurmountable obstacle to the grant of habeas relief, the Seventh Circuit engaged in a labored (and ultimately unsuccessful) effort to conform petitioner's claim to existing precedent by mischaracterizing the state trial judge's remarks. The Seventh Circuit wrongly construed those remarks to establish that the trial judge found the State's evidence insufficient to find respondent guilty, and that the trial judge's conclusion was based solely, or at least primarily, on the inference that respondent knew the victim was a drug dealer. App. 8a-9a. But to the contrary, the judge explicitly referred to "the State's evidence" in rendering his verdict. App. 4a-5a. That evidence, which included two eyewitnesses who identified respondent as the murderer, as well as respondent's

attempted flight when he was stopped for speeding shortly after the murder, was more than sufficient to sustain respondent's conviction, and respondent does not argue otherwise. That the trial judge inferred a motive, which is not an element of the crime, while noting that the witnesses all "skirted" that issue, does not negate the fact that he relied on "the State's evidence" to convict respondent. *Id.*

In any event, even if the Seventh Circuit's description of the trial judge's thinking were accurate, habeas relief would still be precluded because the State's evidence was sufficient to establish the elements of the crime and there was no improper influence on the trier's decision-making process. No case relied on by the Seventh Circuit and no other precedent of this Court holds otherwise, thus precluding habeas relief. *See supra* at 8-9.

5. The Seventh Circuit's grant of habeas relief in this case is impossible to reconcile with AEDPA—as well as with the decisions of this Court construing it—which emphasizes comity, finality, and federalism. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). Given the importance of these interests, the absence of a circuit split has not deterred this Court from granting certiorari (and reversing) in numerous cases in which the federal appellate courts have ignored the dictates of § 2254 and granted habeas relief despite the absence of clearly established Supreme Court precedent. *See, e.g., Donald*, 135 S. Ct. at 1378; *Frost*, 135 S. Ct. at 430-32; *Smith*, 135 S. Ct. at 4; *Van Patten*, 552 U.S. at 124-26; *Musladin*, 549 U.S. at 77; *see also Cross*, 132 S. Ct. at 495. This Court should

summarily reverse the judgment in this case, or, in the alternative, grant this petition and set the case for full briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2015

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-1419

LAWRENCE OWENS,

Petitioner-Appellant,

v.

STEPHEN DUNCAN, WARDEN,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 08 C 7159 - **Thomas M. Durkin,** *Judge.*

ARGUED MARCH 3, 2015 — DECIDED MARCH 23, 2015

Before POSNER, KANNE, and TINDER, *Circuit Judges.*

POSNER, *Circuit Judge.* Lawrence Owens was convicted of first-degree murder in November 2000 after a bench trial in the Circuit Court of Cook County. The judge sentenced him to 25 years in prison; he has almost 11 years of his sentence left to serve. His conviction and sentence were affirmed. He

then filed state claims for post-conviction relief that came to naught eight years after having been filed, when the state supreme court declined to hear an appeal from the affirmance by the intermediate appellate court of the trial court's denial of Owens' petition for such relief.

He had already filed a petition for federal habeas corpus relief, 28 U.S.C. § 2254, and, the state proceedings having finally wound up, the federal district court adjudicated the petition—and denied it, precipitating this appeal. In it he argues that the state trial judge who convicted him based his decision on evidence that did not exist, thus denying him due process of law in violation of the Fourteenth Amendment. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) ("one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial," quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice") (citation omitted); see also *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009) ("Guilt beyond a reasonable doubt cannot be premised on pure conjecture"); *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006) ("The presumption [of innocence] is violated . . when the jury is encouraged (or allowed) to consider facts which have not been received in evidence").

In 1999, in the City of Markham (current population 12,508), 20 miles south of Chicago, a

young man named Ramon Nelson, while riding his bike away from a liquor store, received a fatal blow to the head by a person, presumably male, wielding a wooden stick that may have been a baseball bat. Two eyewitnesses to the murder testified at Owens' trial. Maurice Johnnie identified Owens as the murderer from a photo array of six persons and from a lineup — although Owens was the only person in the line-up who also was in the photo array, thereby diminishing the probative value of the second identification. The other eyewitness, William Evans, identified Owens as the murderer from the same photo array and a lineup. But at the trial, though Owens was present in the courtroom, Evans twice pointed to a photo of someone else in the photo array as being Owens. There were other discrepancies between the two witnesses' testimony. Evans testified that there had been two assailants, Johnnie that there had been only one. And Evans but not Johnnie testified that Nelson had spoken with the assailants before they assaulted him

Nelson had crack cocaine on his person when he was killed that appeared to be packaged for individual sale, for the cocaine was in 40 small plastic bags in his coat. No evidence was presented that Owens had known Nelson, used or sold illegal drugs, or had any gang affiliation. If Owens had had any record of involvement in the illegal drug trade, or in gangs, the prosecution would, one imagines, have presented evidence of that involvement; it did not. Also absent was any physical evidence (such as fingerprints on the baseball bat) pointing to Owens as the murderer. Moreover, the murder had taken place at 8:30 p.m. on September 22. Sunset was at 6:47p.m. that evening, and so it would have been dark ("nautical twilight" as it is called —the hour after sunset— would have

ended by 7:47 p.m., see WeatherSpark, "Average Weather On September 22 For Chicago, Illinois, USA: Sun," https://weatherspark.com/averages/30851/9/22/Chicago-Illinois-United-States (visited March 11, 2015)) — three quarters of an hour before the murder took place. Not pitch black, though, and apparently the area in which the murder was committed had been illuminated to an undetermined extent by light from street lamps and from a nearby building.

The eyewitness identification (at least by Maurice Johnnie) could, we assume despite the substantial doubts that have been raised concerning the reliability of eyewitness evidence (see, e.g., National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* (2014); Sandra Guerra Thompson, "Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony," 4 *U.C. Davis L. R.* 1487 (2008); Nancy Steblay et al., "Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison," 27 *Law and Human Behavior* 523 (2003); Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 *Law and Human Behavior* 603 (1998)), have supported a finding beyond a reasonable doubt that Owens had murdered Nelson. But it is highly uncertain whether the judge (for remember that Owens' trial was a bench trial, not a jury trial) thought that *any* of the evidence that had been presented sufficed to dispel reasonable doubt of Owens' guilt. For at the end of the parties' closing arguments the judge said: "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug

dealer [Nelson], who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." That was *all* the judge said in explanation of his verdict, and it was nonsense. No evidence had been presented that Owens knew that Nelson was a drug dealer or that he wanted to kill him (we assume that by "knock him off" the judge meant "kill him"), or even knew him— a kid on a bike. The prosecutor had said in his closing argument that the case "boils down to identification ..., how they identified him and where ... and *in* this case identification equals recognition." The judge seems not to have been convinced, for he said nothing to suggest that *he* thought the real issue *in* the case was identification. If one may judge from what he said, which is the only evidence of what he thought, he thought that Owens' knowledge that Nelson was a drug dealer was *the* fact that dispelled reasonable doubt of Owens' guilt. Otherwise, why would he have called the existence of this fact the "real issue" in the case—the basis therefore of the verdict?

Even if the proper way to determine whether the judge would have convicted Owens had he not mistakenly believed that Owens knew Nelson and knew him to be a drug dealer (and wanted to kill him for that reason) would be to ask the judge what he was thinking when he sentenced Owens almost 14 years ago, that approach would be impossible. The judge died two years ago. *Chicago Tribune Obituaries,* "Joseph M. Macellaio," April 3, 2013, www.legacy.com/obituaries/chicagotribune/obituary.aspx?pid=164012815 (visited March 11, 2015).

On Owens' appeal from his conviction, the state appellate court ruled that the trial judge's belief that Owens knew Nelson to be, or was himself, involved with drugs or gangs was baseless, saying "there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade." The court also said that "the reliability of Evans' testimony is severely called into question," noting not only Evans' two failures to identify Owens in the photo array in the courtroom but also his having been promised by the prosecution probation on two drug charges in exchange for his testimony. Nevertheless the court ruled 2-1 that the trial judge's error had been harmless because Johnnie's eyewitness identification of Owens was sufficient to establish Owens' guilt. The federal district court, in denying Owens' petition for habeas corpus, added nothing to the state courts' discussion of the harmless-error issue.

The dissenting judge in the state appellate court pointed out that the trial judge had "never stated that he relied on that identification or other properly admitted evidence," so that "what we do have is a trial judge manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict." She added that the error was not harmless because the trial judge had "only considered unsupported insinuations without any indication that he was aware of this impropriety." The trial judge hadn't actually *said* that he'd considered only evidence not in the trial record, but the only ground for his finding Owens guilty that he mentioned had no basis in that record (or

elsewhere for that matter).

Not every fact on which a verdict is based must be found in or inferred from evidence introduced by a party. There is judicial notice (for example of what time nautical twilight begins and ends on a given day of the year); there are legislative facts; there are stipulated facts. But there was no factual basis of any sort, in the trial record or elsewhere, for the judge's finding that Owens knew Nelson, let alone knew or cared that he was a drug dealer. The judge made it up.

In its brief in our court the state argues that the judge's determination that Owens knew Nelson and knew him to be a drug dealer, etc. was a reasonable inference from Owens' having killed him. The argument is that the judge, having (without bothering to say so) concluded that Owens had killed Nelson, was merely remarking that it was a drug-related crime. And indeed it is highly plausible that Nelson was murdered by someone in the drug business. But the critical issue in the case was whether *Owens* had murdered Nelson. The murderer's motive could not have been "the real issue" in the case — as the state keeps stressing, motive is not an element of the crime of murder or of the prosecution's case and was not addressed by Owens' trial counsel either, and the prosecution had made no effort to prove that Owens had known Nelson or was himself in the drug business. If as the judge thought and is plausible in light of what was found on Nelson's person the murderer was a drug dealer, there's a good chance Owens was not the murderer.

The state mistakenly characterizes Owens as contending that "inferring a defendant's motive

entitles petitioner to a new trial if that inference is not fully supported by the evidence at trial." Had the judge said that he'd found the defendant guilty beyond a reasonable doubt on the basis of the evidence presented at the trial, and merely added that "by the way my guess is that Owens knew Nelson and killed him for reasons related to their both being drug dealers," Owens would have no case, because the judge's observation would not have been the basis of Owens' conviction. In fact the evidence of Owens' guilt was as we've seen far from conclusive, yet its uncertainty did not engage the judge's attention. The judge appears to have been thoroughly confused — and likewise the state when it argues in its brief in our court that the judge's inference that Owens killed Nelson for drug-related reasons "was arguably a reasonable inference from the" fact that "Nelson had forty bags of crack cocaine on him at the time of the attack." Nelson's being a drug dealer could not by itself have supported any such inference about the identity of his murderer unless more had been known about the murderer than the prosecution was able to establish.

Nonetheless, to repeat, we can assume that if the evidence of Owens' guilt had been overwhelming, the judge's conjecture that Owens knew Nelson and knew him to be a drug dealer and that Owens was (as the judge's comment implied) himself involved in the drug trade (why else would he want to kill Nelson?) could be disregarded as goofy but harmless. But evidence of Owens' guilt was not overwhelming. Had it been, it is unlikely that the judge would have described Owens' supposed (but by only the judge) knowledge of Nelson's involvement in the drug business as "the real issue" in the case. What may

have made it the "real issue" to the judge was the scantiness of the actual evidence of Owens' guilt.

It remains to consider whether the judge's blunder satisfies the test for whether a state court's error, though of constitutional magnitude (in this case, because the judge based a verdict of guilty on ungrounded conjecture), can escape being deemed "harmless" when challenged in a federal habeas corpus proceeding. The test "is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas [corpus] petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas [corpus] relief based on trial error unless they can establish that it resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citations and internal quotation marks omitted). Owens has satisfied this standard. Given that the entire case pivoted on two shaky eyewitness identifications, Owens might well have been acquitted had the judge not mistakenly believed that Owens had known Nelson to be a drug dealer and killed him because of it. As we explained in *Jones v. Basinger*, 635 F.3d 1030, 1053-54 (7th Cir. 2011), the question that *Brecht* requires us to answer is not whether a reasonable trier of fact could have rendered the verdict that it (in this case he) did, but whether the trier of fact committed an error that had a substantial malign influence on the verdict. The trial judge's singling out as the only explanation for the verdict a "fact" having no evidentiary support, and declaring it the "real issue" in resolving the case, had to have had such an influence.

We are mindful that only clearly established

violations of a defendant's constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding. *Nevada v. Jackson*, 133 S. Ct. 1990 (2013). But there's no question that the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial satisfies that exacting standard. That is clear from the Supreme Court decisions in *Holbrook*, *Taylor*, and *Estelle*, and our own *Garcia* and *Moore* decisions, from all of which we quoted earlier. It's true that we know of no case identical to this one—unsurprisingly, given the combination of weak proof with a verdict based on groundless conjecture. But identity can't be required. The Supreme Court has made clear in the cases we've cited and quoted from that a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever. Just imagine that the judge in our case had said "I know there's no evidence of guilt, but I also know that prosecutors in the City of Markham *never* prosecute an innocent person." The defendant would be entitled to relief *in* a habeas corpus proceeding even though that precise statement had never been uttered by a judge before.

And so we reverse the judgment denying Owens relief and give the state 120 days in which to decide whether to retry him. If it does not decide within that period to retry him, he must be released from prison.

2014 WL 539125
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Lawrence Owens, Petitioner,
v.
Marc Hodge, Warden, Lawrence Correctional Center, Respondent.

No. 08 C 7159 Filed: February 11, 2014

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MEMORANDUM OPINION AND ORDER

Thomas M. Durkin, United States District Judge

*1 Petitioner Lawrence Owens, an Illinois state prisoner serving a 25—year prison term for the first degree murder of Ramon Nelson, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Owens's petition, filed in December 2008, raised five claims that he alleged warranted habeas relief: (1) his due process rights were violated by the state court's delay in resolving his claims for state postconviction relief ("Claim 1"); (2) there was no probable cause to arrest him ("Claim 2"); (3) the trial court admitted a photo

array and lineup identification that were both improperly suggestive ("Claim 3"); the trial court made improper "extrajudicial" findings regarding Owens's motive to commit murder and based its findings of guilt on evidence not produced at trial ("Claim 4"); and (5) trial counsel was ineffective for failing to investigate and call alibi witnesses and for misleading Owens regarding his right to testify ("Claim 5"). R. 1.

On May 29, 2012, the Court found Claim 1 to be non-cognizable; Claims 2 and 3 to be procedurally defaulted; and Claim 4 to lack merit. *Owens v. Acevedo,* No. 08 C 7159, 2012 WL 1416432, at *7-9 (N.D.Ill. May 29, 2012) (Pallmeyer, J.). The Court also ordered an evidentiary hearing on the ineffective assistance claim presented in Claim 5 and reserved ruling on whether a certificate of appealability should issue. *Id. at *15.* [1] On March 18 and 19, 2013, the Court conducted an evidentiary hearing. R. 125, 126. The parties completed their post-hearing briefing on January 9, 2014.

Based on the testimony and documentary evidence presented at the evidentiary hearing, and the credibility determinations the Court makes regarding the witnesses who testified, Owens's habeas petition is denied. The Court further declines to certify any issues for appeal.

Background

A. Trial Evidence

Owens was convicted at a bench trial. The evidence introduced at trial was recounted by the state appellate court in its order affirming Owens's

conviction on direct appeal, R. 152-1 at 136-49, and in the Court's prior opinion, *Owens*, 2012 WL 1416432, at *1-4 (Pallmeyer, J.). Absent clear and convincing evidence to the contrary, which Owens has not presented, these facts are presumed correct for purposes of federal habeas review. *See* 28 U.S.C. § 2254(e)(1); *Morgan v. Hardy*, 662 F.3d 790, 797 (7th Cir.2011).

On September 22, 1999, at approximately 8:30 p.m., 17—year—old Ramon Nelson was beaten with a baseball bat outside a liquor store and lounge in Markham, Illinois. Nelson died as a result of this beating. Before the beating occurred, Maurice Johnnie was sitting in the passenger seat of his car with two friends; his friend Johnny Morgan was sitting in the driver's seat, and Morgan's friend was sitting in the backseat. The three were parked about ten feet from the entrance to the liquor store and were facing the direction of the store's front doors. The sun had gone down, but it was not quite dark yet, and the area in front of the store was illuminated by street lights and lights from the liquor store's front doors

*2 At one point, Morgan's friend exited the car and entered the liquor store. While Johnnie and Morgan waited in the car for him to return, Nelson pulled alongside the parked vehicle on a bicycle and began speaking with Morgan Johnnie did not know Nelson. After Nelson and Morgan spoke for about three to five minutes, Nelson rode his bicycle past the front of the car, down the sidewalk, towards the entrance of the liquor store. Johnnie then saw a man, later identified as Owens, walking down the sidewalk in the opposite direction and toward Nelson. Nelson attempted to

turn his bicycle around, but Owens caught up with him and struck him on the head with a baseball bat. Nelson fell from his bicycle into the doorway of the store, and as he lay on the ground, Owens forcefully struck him in the head a second time with both hands on the bat. After Owens had hit Nelson a second time, he turned and walked back in the direction from which he had come. Johnnie and Morgan exited their vehicle and went to aid Nelson, who was unconscious and groaning. Morgan insisted they take Nelson to the hospital where Nelson died the next day as a result of multiple skull fractures.

That night, William Evans was also on the same block as the liquor store. About a half hour before the attack, Evans had spoken to Nelson, whom he knew from the neighborhood. After talking with Nelson, he observed Nelson ride his bicycle toward the store's front entrance. At the time of the attack, Evans was retrieving a bucket at the northeast corner of the block to wash a car when he then heard a "wood splitting" sound. Evans looked back in the direction of the sound and saw Owens, who he did not know but recognized as someone who had previously been in the liquor store. Evans saw Owens strike Nelson twice on the head with a baseball bat. When Evans cried out, "hey, what is going on," Owens and another individual ran off past him Evans went to aid Nelson and helped Johnnie and Morgan put Nelson into Johnnie's car. Immediately after the attack, Evans spoke with police, described the approximate height and weight of the two individuals he saw, and informed them that he recognized Owens from the neighborhood.

At trial, Evans revealed that he had a prior drug conviction for which he was on probation, and was in custody on another drug charge. He also acknowledged that he was testifying in exchange for State recommendations of probation on that pending drug charge and a recommitment of probation on the previous drug offense.

Johnnie did not speak with police officers that night, and when he dropped Nelson off at the hospital, he provided a false name and address. Responding officers to the crime scene, however, obtained the license plate number of the vehicle that transported Nelson to the hospital, and Detective Terry White was able to identify Johnnie from the vehicle's registration. About a week after the incident, on September 28, 1999, Johnnie was interviewed at the Markham police station where he described Nelson's attacker as a large black male, approximately 6'2' to 6'4', weighing 220 to 240 pounds and dressed in brown clothing. Based on Johnnie's description, Detective White compiled a photo array of six men. From the photo array, Johnnie selected Owens's photo as the individual who attacked Nelson. Detective White stated at trial that at no time while Johnnie viewed the array did he ever suggest that the attacker was in the array or make any other suggestive remark. That same day, Evans viewed the photo array at the police station. He also described Nelson's attacker as a large black male, dressed in brown or tan clothing. Detective White testified that Evans identified Owens from the photo array as Nelson's attacker.

Following the photo identifications, the police were on the lookout for Owens in connection with Nelson's

murder. [2] On October 26, 1999, Officer Mike Alexander observed a speeding vehicle. Officer Alexander activated his emergency lights and siren, and instead of stopping, the vehicle accelerated through a stop sign and proceeded down the road with Alexander in pursuit. When the vehicle finally pulled over, Owens exited the vehicle and ran. Alexander gave chase and apprehended Owens a block and a half later. At his motion to quash his arrest, Owen claimed that he did not see Alexander's squad car until 30 seconds before he pulled over and that he walked, not ran, upon exiting his vehicle.

*3 A day after Owens's arrest, Detective White arranged a five-man lineup for Johnnie and Evans to view. Each independently selected Owens from that lineup as Nelson's attacker. At trial, Detective White acknowledged that Owens was the only individual who appeared in both the photo array and lineup viewed by Johnnie and Evans Johnnie testified that of the five individuals in the lineup, Owens was the "biggest and bulkiest" but that he did not select Owens out of the lineup based on height because everyone in the lineup was seated. When asked to view a photograph of the lineup at trial, Evans identified Owens as the man he had identified to Detective White the night he viewed the lineup, though earlier in his testimony, Evans had twice failed to identify the photo of Owens in the array he had selected at the police station.

The parties stipulated at trial that 40 bags of crack cocaine were found in Nelson's coat pocket. The defense rested without presenting any evidence. After hearing closing arguments, the state trial court

convicted Owens of the first degree murder of Nelson, and then sentenced him to 25 years of imprisonment.

B. Postconviction Affidavits

After an unsuccessful round of direct appellate review of his conviction, Owens pursued further relief in state court by filing a postconviction petition.[3] Owens filed his first petition *pro se* on September 10, 2003, and then through appointed counsel filed an amended petition on June 16, 2008 and an amended supplemental petition on November 7, 2008, claiming that trial counsel was ineffective for failing to interview and call alibi witnesses and for failing to allow Owens to testify at trial; Owens also raised an actual innocence claim. R. 152-2 at 24-111, 112-35.[4] In support of his ineffective assistance claim, Owens presented two sets of affidavits that each included affidavits from Owens, Timothy Blackman, Sheila Minor, and Owens's mother, Bertha Marie Owens. All the documents in the first set were dated in the summer months of 2003 and were filed with the state court on September 11, 2003; all the documents in the second set were signed on dates ranging from 2006 to 2009.

Owens asserted in his August 26, 2003 affidavit that he was actually innocent of Nelson's murder and that he repeatedly informed his attorney, Frank Rago of that fact. R. 152-2 at 55-56. According to Owens, he told Rago that he had an alibi for the night Nelson was murdered and that he had two witnesses who could corroborate that alibi—Blackman and Minor. *Id.* at 55. Owens further averred that Rago told him and his mother that he would investigate Owens's alibi witnesses and that he would "allow" Owens to

testify in his own defense. *Id.* at 56. But, Owens says, Rago failed to investigate or interview his alibi witnesses and "forb[ade] [Owens] to testify *[sic]* in [his] own defense." *Id.* Owens added in his January 11, 2008 affidavit that "[a]lthough [he] felt [he] needed to testify at trial ... Rago told [him] not to worry, meaning that [Owens] would be acquitted." *Id.* at 98. Owens claimed that neither Rago nor the trial judge explained that he had a right to testify at trial and that the decision regarding whether to testify was his. *Id.* And had he known it was his decision to testify, Owens adds, he would have testified that he did not murder Nelson and was with Minor and Blackman at the time. *Id.*

In his July 18, 2003 affidavit, Blackman details the time he and Owens spent together on September 22 and 23 in 1999. Blackman avers that at 2:30 p.m., he and Owens were standing in front of Owens's house when their mutual friend, Sheila Minor, drove by and asked them to help her assemble a new dinette set. *Id.* at 57 At about 6:15 p.m., Owens and Blackman met Minor at her father's home, and from there they drove to Minor's house where they arrived around 7:20 p.m. *Id.* At her house, Owens and Blackman assembled the dinette set and then spent the rest of the evening talking, eating, and watching television. *Id.* Around 10 p.m., Minor offered to drive Owens and Blackman home but also offered to let them spend the night and drive them home the following morning. *Id.* Owens and Blackman spent the night at Minor's home—they never left her home after they arrived — and Minor drove them home around 6 a.m. the next morning. *Id.* Blackman states in his affidavit that prior to trial, he spoke with Owens's mother and told her that he would testify to these events. *Id.* Owens's

mother told Blackman that Owens's attorney would contact him, but Blackman averred that Rago never called, interviewed, or asked him to testify for Owens. *Id.*

*4 Blackman's second affidavit, dated August 23, 2009, provides a fairly similar account, adding that Blackman and Owens met while they were high school students and that the two had known each other for 18 years. R. 152-2 at 101. According to Blackman, in September 1999, he and Owens saw each other three or four times a week, and on September 21, 1999, Owens and Blackman celebrated a friend's (Manny) birthday together. *Id.* Slightly different from his earlier affidavit, Blackman stated in his 2009 affidavit that on September 22, 1999, he and Owens met at Blackman's house—not Owens's house—and that they returned home from Minor's house the next day at 8 a.m.—not 6 a.m. *Id.* at 101-02. Blackman concludes his affidavit by saying that although the events described in the affidavit were from many years earlier, he was "certain of the dates," because he recalled celebrating Manny's birthday. *Id.* at 103.

Minor's affidavits recounted the night she spent with Owens and Blackman in a similar fashion. R. 152-2 at 58, 104-05. According to Minor, she was with Owens and Blackman at her house from 7:20 p.m. on September 22, 1999 to about 6 a.m. on September 23, 1999. *Id.* at 58, 104. Minor stated that Owens's attorney, Rago, never called, interviewed, or asked her to testify, though she would have been willing to do so. *Id.*

Bertha Marie Owens provided two affidavits, which discussed her involvement in Owens's defense. *Id.* at 59-60, 106-07. In her affidavits, she states that on several occasions, she informed Rago that Blackman, Minor, and Owens wanted to testify about Owens's alibi defense, and she provided Rago with Blackman's and Minor's names and contact information. *Id.* at 59-60, 106. Yet Rago never interviewed them or investigated the alibi defense, despite assurances to Ms. Owens that he would. *Id.* Ms. Owens claimed that Rago decided not to use the alibi defense or allow Owens to testify because the case against Owens was "so weak ... that he would never get convicted." *Id.* at 60; *see also id.* at 106

C. Procedural History

While his state postconviction proceeding was pending, Owens initiated this § 2254 proceeding on December 15, 2008. R. 1. The Warden moved to dismiss Owens's § 2254 petition based on Owens's failure to exhaust his available state court remedies. R. 18. Owens responded, citing the inordinate delay by the state courts in resolving his postconviction petition, which, at that point, had been pending for more than five years. R. 21. The Court appointed counsel to investigate the status of Owens's long-pending postconviction petition and to assist Owens with responding to the Warden's motion to dismiss. R. 57. On March 9, 2010, the Court denied the Warden's motion to dismiss, noting that while some of the delay was attributable to the conduct of his appointed attorneys, Owens had demonstrated that a ruling on his postconviction petition was delayed for reasons outside of Owens's control and that Owens had been diligent in urging action on that petition. R. 24. The

Court then ordered the Warden to answer the § 2254 petition, *id.*, which the Warden did, R. 41.

Meanwhile, Owens's postconviction petition made its way through the state courts. In his postconviction appeal, Owens argued that trial counsel was ineffective for failing to call Minor and Blackman to testify at trial and that he was deprived of his constitutional right to testify on his own behalf. R. 77 at 115-16. The state appellate court denied Owens's postconviction appeal on March 21, 2011, *id.* at 118-19, and Owens's round of postconviction review concluded when the Illinois Supreme Court denied Owens's petition for leave to appeal, raising the same claims raised in his postconviction appeal, on September 28, 2011, R. 77 at 151.

On May 29, 2012, the Court resolved a number of the claims raised in Owens's § 2254 petition, finding Claim 1 to be non-cognizable, Claims 2 and 3 to be procedurally defaulted, and Claim 4 to lack merit. *Owens,* 2012 WL 1416432, at *7-9 (Pallmeyer, J.). As to Claim 5, the Court found that the ineffective assistance allegations in Claim 5 were not procedurally defaulted and determined that an evidentiary hearing was necessary to ascertain (1) whether trial counsel failed to investigate Owens's alibi defense, interview his alibi witnesses, or call his alibi witnesses to testify on Owens's behalf; and (2) whether, and to what extent, Owens understood his right to testify. *Id.* at *10-14; *see also* R. 78.

*5 The evidence offered at the evidentiary hearing conducted on March 18-19, 2013 included live testimony from Owens, Timothy Blackman, Owens's trial counsel Frank Rago, and Noel Zupancic, an

investigator with the Cook County Public Defender's Office. The evidence also included the postconviction affidavits offered by Owens, Blackman, Minor, and Bertha Marie Owens [5] in support of Owens's ineffective assistance claim and other documentary evidence relating to Rago and Zupancic's investigation into Owens's alibi defense.

Analysis

Owens is entitled to habeas relief if he is being held under a state court judgment obtained in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Owens alleges habeas relief is warranted because his trial counsel was ineffective for two reasons: (1) counsel failed to investigate his alibi defense and relatedly, failed to call alibi witnesses to support that defense; and (2) counsel misled Owens regarding his right to testify at trial.

To prevail on a claim of ineffective assistance under *Strickland v. Washington,* Owens must demonstrate that (1) his trial counsel rendered deficient performance, meaning his representation fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors or omissions, there is a reasonable probability the result of the trial would have been different. 466 U.S. 668,694 (1984); *see also Brady v. Pfister,* 711 F.3d 818,823 (7th Cir.2013).

I. Counsel's Failure to Investigate Owens's Alibi Defense and Call Timothy Blackman and Sheila Minor as Alibi Witnesses

A. Factual Background

At the evidentiary hearing, Owens testified that he could not have committed the murder of Ramon Nelson on September 22, 1999 because he was with Timothy Blackman and Sheila Minor at Minor's house at the time the murder took place. R. 126 at 70-77.[6] According to Owens, on the afternoon of September 22,1999, he saw his friend Tasha (last name then unknown) at 3 p.m.; he then saw his friends Karee Williams, Jamil, Greg, Kenworth, and Will (last names unknown) around 5 p.m. at Tasha's house. *Id.* at 129-32. After Owens left Tasha's house around 5:30 p.m., he then spent the remainder of the evening with Blackman and Minor at Minor's house assembling her furniture. *Id.* at 70-77. Owens claimed that he was with them from 6 p.m. on September 22, 1999 until 6 a.m. the following morning when Minor drove him and Blackman home. *Id.* He, Blackman, and Minor were childhood friends, and during that time period, they saw each other regularly. *Id.* at 124,126,156-58. Indeed, Minor was one of Owens's best friends, and after Owens's arrest and conviction, Minor visited Owens numerous times at the Cook County Jail and the Illinois Department of Corrections. *Id.* at 159-60.

Owens testified that after he was arrested, he told police that he had an alibi for the night of the murder, and when he met his attorneys, Rago included, he also told them about that defense. *Id.* at 78-85; *see also* R. 140-2 at 2. Owens said that he gave Rago several

names of individuals who could corroborate his whereabouts that night—Blackman, Minor, Karee Williams, and Jamil, Will, Kenworth, and Tasha [7] — and followed up later with Rago regarding these individuals, further giving Rago the addresses of Blackman, Tasha, and Minor's father (Owens did not know Sheila Minor's address). R. 126 at 85-88,99-100,216— 17. According to Owens, Rago told Owens that he had tried to locate Blackman, but Rago never told Owens that Blackman had said when Rago found him that he did not recall being with Owens on the night of the murder. *Id.* at 199-201. Owens added that he believed that he tried to contact Blackman to tell him to reach out to Rago, and he told Minor to talk to Rago when she visited him at the Cook County jail. *Id.* at 218. Owens further stated that when he asked Rago about the status of his alibi witnesses, Rago told Owens that he "didn't like" those witnesses, an explanation that Owens accepted. *Id. at* 110-11,119.

*6 Owens testified that after he was charged with murder but before his trial, he sent Rago a letter where he told Rago that he could not have committed the murder because he was not at the scene at the time. *Id.* at 135-37; *see also* Resp. Exh. 20, Letter from Owens to Rago dated February 19, 2000. Owens acknowledged that the letter did not mention that he was with Blackman, Minor, Tasha Dugar, or any of his other friends at the time of the murder. R. 126 at 138-40. After he was convicted, Owens sent Rago several more letters. *Id.* at 141-46; *see also R.* 140-3 at 4-10. Nowhere in those letters, where Owens sets forth several bases for a motion for a new trial, did Owens mention Tasha, Karee, Jamil, Greg, or Kenworth; nor did he say that he was with Blackman and Minor on the night of the murder, or challenge

Rago's failure to investigate Owens's alibi defense. R. 126 at 146-52; *see also* R. 140-3 at 4-10. Indeed, nowhere in these letters did Owens indicate he was dissatisfied with Rago's representation of him. *Id.*

Rago testified that he became a licensed attorney in 1975. R. 125 at 31, 92. After he was licensed, Rago worked as an assistant public defender. *Id.* at 93. Around 1982 to 1983, he became a felony trial assistant at the Markham County courthouse where he worked until 2002. *Id.* at 94. During that time, the Public Defender's Office employed a system with four classification levels of attorneys. *Id.* at 31-32, 95. Attorneys classified as Level I attorneys were assigned to misdemeanor or traffic-level cases; Level II attorneys handled more serious misdemeanor cases; Level III attorneys were felony trial attorneys; and attorneys classified as Level IV attorneys were qualified to handle death-penalty cases. *Id.* at 31-32, 95. Rago was a Level IV attorney. *Id.* During Rago's almost 20—year career with the Public Defender's Office, Rago handled over 300 murder cases, 10 to 15% of which were trials, resulting in about 30 to 45 murder trials over the course of his career. *Id.* at 32-34, 97-98.

Rago testified that he began representing Owens sometime after Owens's October 1999 preliminary hearing. *Id.* at 100-01. Rago lacked specific recollection regarding much of his representation of Owens and of his investigation into Owens's case, and much of his testimony regarding his representation of Owens was based on his general practice at the time. *See Williams v. Lemmon,* 557 F.3d 534,540 (7th Cir.2009) (allowing for conclusion that a lawyer acted in accord with his normal practice). Rago testified

that after assignment to Owens's case, he would have reviewed the report generated by the Assistant Public Defender assigned to represent Owens at his preliminary hearing. R. 125 at 99-103. That report revealed that Owens was asserting a potential alibi defense, namely that on the night of the murder, he was drinking with friends. *Id.* at 70-71, 100-103; *see also* R. 140-2 at 2.

During the course of his representation of Owens, Rago made several requests to his investigator Noel Zupancic for the purpose of Owens's defense. Zupancic began working as an investigator at the Public Defender's Office in 1994. R. 126 at 6. Similar to the classification levels of attorneys, the Public Defender's Office employed several levels of investigators. According to Zupancic, an Investigator I served subpoenas, transported witnesses, and accompanied other investigators on their investigations whereas an Investigator II, which was what Zupancic was at the time of the Owens investigation, conducted witness interviews. *Id.* at 7, 43. An Investigator with a Level III classification handled more complex cases and could serve as a lead investigator in a case. *Id.* at 7. Around 2001, Zupancic became an Investigator III. *Id.* at 7-8.

Rago's first investigative request to Zupancic occurred around July 3, 2000. In that request, Rago asked Zupancic to accompany him to the crime scene—to observe the locale, its lighting conditions, and the positions of the surrounding buildings for the purpose of matching these details against the information in the police reports. R. 125 at 36-39, 76-78, 123-26; R. 126 at 9; *see also* R. 140-2 at 18. Rago made another investigative request to Zupancic around September

12, 2000 to locate potential alibi witnesses, Timothy Blackman and "Tasha" (last name then unknown), names Rago presumed he acquired from Owens, the individual, he said, who was best in the position to provide Rago with this information. R. 125 at 40-41; R. 126 at 15, 35; *see also* 140-2 at 20. Based on his general practice at the time, Rago testified that as soon as he learned that Blackman and Tasha could be potential alibi witnesses, he would have acted immediately on that information because delayed action on those leads could prove detrimental to Owens's case. R. 125 at 127. Based on that general practice, Rago believed that since the investigative report indicated that he requested an investigation into Blackman and Tasha around September 2000, Owens must have given him the names of these witnesses around that time. *Id.* at 126-27. During Rago's conversations with Owens regarding his defense, Owens never mentioned Sheila Minor as a potential alibi witness to Rago. *Id.* at 60, 128. If Owens had done so, Rago said, he would have tried to locate her, like he did with Blackman and Tasha. *Id.* at 128.

*7 During her investigation into Owens's alibi defense, around early November 2000, Zupancic tracked down an individual who she believed to be Blackman. *Id.* at 82-83, 134; R. 126 at 25-28; *see also* R. 140-2 at 21. Zupancic spoke with this individual, who identified himself as Blackman on the phone, and he told Zupancic that he "c[ould] not remember anything specific about the night of September 22nd, 1999" and that he "really c[ould] not say that he was with [Owens]" that night. R. 125 at 85, 134; R. 126 at 27-30, 51; *see also* R. 140-2 at 21-23. Blackman, however, told Zupancic that he regularly saw Owens

during that time period. R. 125 at 85; R. 126 at 30. After this conversation, Zupancic and Blackman made further plans for an in-person interview, but Blackman failed to appear at the arranged time and place, and did not return subsequent phone calls from Zupancic. R. 125 at 86, 134-36; R. 126 at 30-34, 52-53.

Pursuant to Rago's September 2000 investigative request, Zupancic also attempted to track down Tasha. R. 125 at 88-89, 136; R. 126 at 17, 19; *see also* *R.* 140-2 at 24-25. Around October 4, 2000, after going to the location she had for Tasha, Zupancic spoke with a man who she believed was Tasha's brother and obtained Tasha's last name (Dugar) and phone number. R. 126 at 17; *see also* R. 140-2 at 24. Zupancic later returned to that address on October 10, 2000, and encountered a woman outside the home who refused to identify herself. R. 125 at 89, 137; R. 126 at 18; *see also* R. 140-2 at 24. The woman told her that Tasha did not live at that address and that she did not know Tasha's current address. R. 125 at 90, 137; R. 126 at 17-18, 20— 21; *see also R.* 140-2 at 24-25. Through further investigation, Zupancic learned that Tasha had a warrant out for her arrest. R. 125 at 90, 138; *see also* R. 140-2 at 24-25. Zupancic testified that she believed that the woman she met outside the house was likely Tasha. R. 126 at 22.

According to Rago, this was the extent of what his investigation revealed regarding Owens's potential alibi witnesses: a witness who he characterized as providing a less than definitive alibi and proved difficult to locate, and a witness who they could not locate at all. R. 125 at 139. Indeed, when asked why he did not present an alibi defense, Rago provided several strategic reasons: (1) Blackman did not assist

Owens with an alibi defense based on the information Rago received from Zupancic regarding her phone interview with him; (2) Zupancic could not locate Tasha; and (3) Rago had received no other information from Owens on which to base an alibi defense or any names for any other potential alibi witnesses. *Id.* at 51-52. Based on the information available to him at the time, Rago decided that his trial strategy for Owens's case was not to present an alibi defense but instead to attack the credibility of the two eyewitnesses who were going to testify that they saw Owens commit the murder. *Id.* at 149.

Timothy Blackman testified that he and Owens were childhood friends. *Id.* at 205. Around the time of the murder, they saw each other fairly regularly at either Blackman's mother's house or Tasha's house where they would drink and play cards. *Id.* at 205, 208-10. Blackman began his testimony by stating that he remembered being with Owens on September 21, 1999 at his friend Manny Jones's birthday party. *Id.* at 206-07. He also remembered assembling a table with Owens and Sheila Minor at Minor's house one evening and staying overnight there. *Id.* at 213-20. According to Blackman, he and Owens arrived at Minor's home around 7 p.m. and returned back to their homes the next morning around 7 a.m. *Id.* at 218-19, 221. Blackman said that he learned that Owens had been charged with murder when he heard other people in the neighborhood talking about it and he read about it in the newspaper. *Id.* at 225. But he never reached out to tell anyone—police, Owens, or Owens's counsel —that he may have been with Owens on the night of the murder because ultimately he was not certain of the day that he was actually with Owens. *Id.*

*8 On cross-examination, Blackman began by testifying that he believed that he was with Owens on September 22, 1999. *Id.* at 233. But he then admitted that he really did not remember which night he went to Sheila Minor's house. *Id.* at 236-37. He remembered celebrating Manny's birthday with Owens on September 21st, but he ultimately could not even recall what year that occurred. *Id.* at 237-38. Later during cross-examination, Blackman again stated that he thought he partied with Owens on September 21st and assembled the table with Owens and Minor on September 22nd. *Id.* at 268. But he then stated again that he was not sure that he went to Minor's house on September 22nd. *Id.* at 268-69.

B. Court's Findings

The Court has carefully considered all of the documentary evidence presented at the evidentiary hearing and has considered the credibility of the witnesses who testified and the reasonableness of their testimony in light of other evidence. After considering all of this evidence, the Court finds the testimony of Rago, Zupancic, and Blackman credible, the testimony of Owens not credible, and the affidavits presented by Minor and Owens's mother suspect.

C. Deficient Performance

Where, as here, the Court reviews counsel's performance *de novo, see* 28 U.S.C. § 2243, the standard for judging counsel's representation remains a "most deferential *one*," *Harrington v. Richter,* 131 S.Ct. 770, 788 (2011). The question under *Strickland*

is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (quoting *Strickland*, 466 U.S. at 690). In reviewing counsel's performance, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

1. Failure to investigate Tasha Dugar and other non-alibi witnesses

At the outset, the Court addresses Owens's claim that Rago was ineffective for failing to investigate a number of potential alibi witnesses, including Tasha Dugar and Owens's friends, Karee Williams, Jamil, Greg, Kenworth, and Will. R. 140 at 102-04. According to Owens, Zupancic's efforts to investigate Tasha as a witness were minimal and her attempts to find Tasha ended far too soon. *Id.* The Warden argues that this aspect of Owens's ineffective assistance claim is procedurally defaulted because it was not raised in one complete round of state court review. R. 150 at 10. Owens failed to respond to this argument.

In his postconviction proceedings, Owens alleged solely that Rago was ineffective for failing to investigate and call Minor and Blackman as alibi

witnesses. R. 152-2 at 43-48. He did not mention counsel's omission regarding any other alibi witnesses. *Id.* It is well-established that failure to allege a specific factual basis for an ineffective assistance claim in one complete round of state court review results in that particular factual basis being procedurally defaulted on federal habeas review. *See, e.g., Pole v. Randolph*, 570 F.3d 922, 934-35 (7th Cir.2009) ("[I]f a petitioner fails to assert in the state courts a particular factual basis for the claim of ineffective assistance [in one complete round], that particular factual basis may be considered procedurally defaulted."); *Stevens v. McBride*, 489 F.3d 883, 894 (7th Cir.2007) ("[T]he failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to procedural default."). Until this proceeding, Owens never asserted counsel's failure to investigate Tasha and Owens's other potential alibi witnesses as a separate factual basis for a *Strickland* claim. Because this specific factual basis was not fully and fairly presented to the state courts in one complete round of state court review, it is procedurally defaulted. *See id.*

*9 And even if this factual basis were not defaulted, it lacks merit in any event. Even Owens acknowledged at the hearing that he was not with Tasha or any of his other potential "alibi" witnesses at the time of the murder. According to Owens, on the afternoon of September 22, 1999, he saw Tasha at 3 p.m., and Karee, Jamil, Greg, Kenworth, and Will around 5 p.m. at Tasha's house. R. 126 at 129-32. None of these witnesses, as Owens now admits, would have provided an alibi for him for the time of the murder, which occurred at 8:30 p.m., *see id.* at 229, at which time Owens was purportedly with Blackman

and Minor. Thus, even if counsel was deficient for curtailing his investigation into Tasha and for failing to sufficiently investigate Owens's other identified friends, Owens can certainly not demonstrate any prejudice by counsel's omissions in this regard given Owens's admission that these witness would not have been able to provide exculpatory testimony at trial.

2. Failure to investigate Minor and Blackman as potential alibi witnesses and failing to call them to testify at trial

Turning to the other factual bases of Owens's ineffective assistance claim, Owens claims that Rago was ineffective for failing to investigate Minor and Blackman as potential alibi witnesses and further by failing to call them as alibi witnesses at trial. But the evidence adduced at the evidentiary hearing demonstrates that the investigation Rago conducted into Blackman and Minor was within the bounds of reasonable professional judgment and not deficient under *Strickland*.

Beginning with Rago's investigation into Minor, Rago admitted at the evidentiary hearing that he conducted no investigation into Minor. Rago explained that the reason for this omission was because Owens never told Rago that Minor was a potential alibi witness. R. 125 at 60 ("That name never came to us."); *id.* at 128 ("If we had been given a name Sheila Minor, yes. Just as we did with these two [Blackman and Tasha], we certainly would have tried to find Sheila Minor too."); *id.* ("Never knew of a Sheila Minor, never."). Had Owens done so, Rago claimed, Rago would have attempted to locate her like he did with the witnesses Owens actually identified—Blackman and Tasha. *Id.*

at 128. Rago acknowledged that Owens asserted a potential alibi defense soon after he was arrested for Nelson's murder. *Id.* at 182-83. The initial alibi was that Owens was drinking with friends at the time, not that he was with Blackman and Minor at Minor's house, his current alibi defense. But according to Rago, Owens only told him about two potential alibi witnesses: Blackman and "Tasha." *Id.* at 51-52. From Rago's perspective at the time, all he knew regarding a potential alibi for Owens was that Owens was with Blackman and Tasha at Tasha's house between 5 and 10 p.m. on the night of Nelson's murder. Based on that information, Rago instructed his investigator, Zupancic, to locate and interview them. Indeed, Rago's testimony in this regard is credible given the records in the Public Defender's investigative files. Minor's name, unlike Blackman and "Tasha's" names, was nowhere in those records. Given that Blackman and Tasha were in the investigative records, if Owens had, in fact, told Rago about Minor, then her name would have been in the records too. It is not. Because Owens never identified Minor to Rago as a potential alibi defense—an assertion from Rago that the Court fmds to be supported by Rago's testimony regarding his past practices and thus credible—Rago cannot be said to have rendered deficient performance for failing to investigate (and call to testify) a potential witness about whom Owens had not made him aware.

As for Rago's investigation into Blackman, the Court finds that investigation to be constitutionally reasonable. After Owens identified Blackman as a potential alibi witness, Rago instructed Zupancic to locate and interview him Zupancic spoke with Blackman on the telephone, and he told her that

while he was friends with Owens and that he regularly saw Owens, he could not recall whether he was with Owens on the night of the murder. Zupancic made further arrangements to follow-up on this conversation with a face-to-face interview, but Blackman failed to appear where the two had arranged to meet. Following this missed appointment, Zupancic made further efforts to find Blackman until the week before Owens's trial, but these efforts proved unsuccessful. Rago stated that it would have been his general practice to ask for Owens's assistance in contacting Blackman since Blackman was proving uncooperative. R. 125 at 53. These efforts to investigate Blackman's potential as a witness were reasonable under the circumstances known to Rago at the time. Finding Blackman uncooperative and given the uncertainty regarding his potential testimony, counsel instead of pursuing the Blackman lead reasonably chose to focus on attacking the credibility of the State's two eyewitnesses. The Court cannot say that counsel was deficient for pursuing this option where it cannot be said that Blackman possessed any exculpatory information.

*10 Nor was Rago deficient for failing to call Blackman to testify at Owens's trial given the testimony Blackman likely would have given. At best, Blackman would have testified that he was not sure whether he was with Owens on the night of the murder. At the evidentiary hearing, Blackman initially thought he remembered being with Owens on September 21, 1999 because his friend, Manny, had a birthday party that night, and he remembered being at that party with Manny and Owens. And he recalled spending the following night with Minor and Owens assembling Minor's furniture. But Blackman later

testified that he could not be sure even what year Manny's birthday party took place. Ultimately, Blackman could only definitively say that there was a night when he celebrated Manny's birthday with Owens and another night when he and Owens spent the night at Minor's home. But he could not say for certain what night that was. That was the reason, Blackman said, that he never reached out to Owens's defense attorney because he was not sure that he was with Owens that night. Blackman's potential testimony does not establish that he was with Owens at the time the murder took place, and his weakness as a potential witness was highlighted by the Court's questioning at the hearing:

Q [the Court]: So it's clear, you believe your friend Manny's party was on September 21st because that's his birthday.
A [Blackman]: Mm-hmm, correct.
Q You're not sure of the year of it that—well, putting two events together.
A Right.
Q There's Manny's birthday, and there's a night you put a table together in Sheila's house, correct?
A Correct.
Q Do you know if the putting the table together at Sheila's house occurred after the night of the birthday party?
A I'm not a hundred percent sure.
***

R. 125 at 277-78. The uncertainty at the hearing was not the result of the passage of time. Zupancic testified that Blackman was similarly uncertain when she interviewed him years earlier. [9] Counsel cannot be

said to have been deficient by failing to present such ambivalent testimony at Owens's trial for such testimony would not have helped Owens's defense.

Moreover, in light of the testimony presented at the hearing and due to her bias and familial relation to Owens as his mother, the Court finds the averments in Bertha Marie Owens's two affidavits regarding counsel's investigation to be incredible. *See e.g., Johnson v. Loftus,* 518 F.3d 453,457 (7th Cir.2008); *Hayes v. Battaglia,* 403 F.3d 935,938 (7th Cir.2005). Ms. Owens indicated that she told Rago that Blackman and Minor wanted to testify about an alibi defense and that she gave him both their numbers and contact information, but Rago failed to interview them or investigate the defense, despite assurances that he would. R. 152-2 at 59-60, 106. But at the evidentiary hearing, Rago denied that this occurred, because if Ms. Owens had, in fact, given Rago this information, he would have immediately acted on it. R. 125 at 162-64. Moreover, Blackman acknowledged during his testimony that he never told Owens's mother that he wanted to testify at Owens's trial. *Id.* at 263-64.[10] Based on Rago's and Blackman's demeanor at the hearing, the Court finds their testimony on these points to be credible. On the other hand, the Court finds Ms. Owens's statements in her affidavit suspect. In particular, the Court finds credible Rago's testimony that if he had been given Minor's name as an alibi witness, either from Owens or Owens's mother, he would have investigated it, just as Blackman and Tasha were investigated.

3. Overall Representation

*11 In the end, Owens received constitutionally adequate representation. In evaluating counsel's representation, the federal habeas court examines not only the lawyer's claimed error "(of omission or commission)," but evaluates the "entire course of the defense." *Williams v. Lemmon,* 557 F.3d 534,538 (7th Cir.2009); *see also Richter,* 131 S.Ct. at 791 ("It is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."); *Pole,* 570 F.3d at 934 (stating that under *Strickland,* federal habeas court must "assess counsel's work as a whole, and it is the overall deficient performance, rather than a specific failing that constitutes the ground for relief') (internal quotation marks omitted).

An analysis of Rago's overall representation here reveals that in addition to investigating Blackman, counsel investigated the other potential alibi witness Owens identified prior to trial. Zupancic was able to identify "Tasha" as Tasha Dugar and made multiple (though unsuccessful) attempts to track Tasha down. Counsel also visited the crime scene with Zupancic to gather information that would assist him in challenging the credibility of the State's eyewitnesses. Also, as part of Rago's representation, he subpoenaed documents from the Markham Police Department, R. 125 at 106-07; *see also* R. 140-2 at 4-5, and when the Department did not timely comply with that subpoena, Rago filed a successful petition for rule to show cause, R. 125 at 109-11; *see also R.* 140-2 at 6-9. Even though Rago was entitled to these materials under Illinois law, Rago testified that he subpoenaed them to make sure that he had access to them as early

in the process as possible so he could act on any pertinent information in them. R. 125 at 108. Rago also filed a motion to preserve evidence so that any evidence the police possessed would not be destroyed or misplaced. R. 125 at 109; *see also* Resp. Exhs. 2 & 3. After Rago received the materials from the police, Rago consulted with Owens who would have told him the basis on which to file a motion to quash arrest, which counsel filed. R. 125 at 112-13; *see also* R. 140-2 at 13. Rago further filed a formal motion for discovery so that he received information from the State more quickly. R. 125 at 115; *see also R.* 140-2 at 10-12.

Further, at trial, counsel advanced a reasonable doubt defense, attacking the testimony of the State's eyewitnesses. Rago impeached Johnnie's eyewitness testimony with: (1) his failure to immediately notify police after the murder occurred—he did not speak with police when he returned to the liquor store from the hospital, and indeed did not speak with police until six days later; (2) the inconsistencies between Johnnie's description of Nelson's assailant and Owens's actual appearance; and (3) the suggestiveness of the photo array from which Johnnie identified Owens—Johnnie described the attacker as "big and bulky" and agreed with counsel's characterization that Owens was the "biggest and the bulkiest" person in the photo line-up. R. 152- 1 at 142. Rago elicited on cross-examination of Detective White that Owens was the only individual in both the photo array and the lineup. *Id.* at 145. And Rago further brought out inconsistencies between Evans's account of the events and Johnnie's account, *id.* at 159-60, R. 112-1 at 109-10, and Evans's prior criminal history and the deal he made with the State for his truthful testimony, R. 112-1 at 81-84. Rago also forcefully stressed the credibility issues regarding Johnnie and

Evans in his closing argument. *Id.* at 100-17. And finally, after Owens was found guilty, Rago filed a motion for new trial in which counsel raised numerous grounds for relief. R. 140-2 at 28-30.

*12 Owens questions Rago's belated attempt to investigate Blackman as a potential witness and for curtailing that investigation when Blackman proved uncooperative. According to Owens, Rago was on notice three days after Owens's arrest that Owens had a potential alibi, but Rago waited nearly ten months before attempting to locate him. Owens also claims that Zupancic's efforts to locate Blackman were minimal, citing Zupancic's acknowledgment that she could have done more to locate Blackman after their failed in-person meeting. But accepting Owens's first argument would require the Court to credit Owens's speculative testimony that he gave Rago actionable information before Rago asked Zupancic to locate and interview Blackman and Tasha and that Rago then failed to act on it. Instead, the Court credits Rago's testimony that it was his general practice to have acted on such information immediately, and if the reports reflected no action on his part, that was because Owens had failed to pass that information to him. *See Williams,* 557 F.3d at 540. Rago cannot be faulted for failing to act on information that he was not given.

Owens's post-trial correspondence to Rago supports Rago's testimony in this respect. In the Court's view, those detailed and well-written letters demonstrated that they were written by an intelligent individual. In those letters, Owens sets forth what he perceived to be weaknesses in the State's case and numerous (nonfrivolous) bases for a motion for a new trial. R.

126 at 141– 47,149-52. Notably, nowhere in those letters did Owens express dissatisfaction with Rago's failure to call Minor as a witness—indeed, nowhere is Minor even mentioned—and only one time is Blackman even referenced. *Id.* In fact, Owens's post-trial letters were generally complimentary to Rago in his evaluation of Rago's efforts. *Id.* at 141 ("Mr. Rago, I would like to truly commend you on your valiant effort on defending me."). Given these letters, the Court does not credit Owens's testimony that Owens provided actionable information regarding his alibi defense that Rago ignored.

And even if it were true that Rago and Zupancic could have done more to locate Blackman and they were deficient in this one respect, that one deficiency does not render their overall work for Owens deficient. *See Williams,* 557 F.3d at 538. Ultimately, Rago believed that based on the (reasonable) efforts they had made to investigate Owens's alibi defense, Owens did not have a viable alibi defense. Blackman's potential testimony did not provide Owens a definitive alibi for the night of the murder and thus would not have aided Owen's alibi defense, and Blackman was proving uncooperative. Nor were Rago and Zupancic able to locate Tasha, Owens's other proposed alibi witness. R. 125 at 49, 139. And Rago and Zupancic received no other information from Owens regarding any other potential alibi witness. *Id.* at 49-52. At that time, Owens made no mention of Minor. Rago acknowledged that without the testimony of these witnesses, he could still have presented an alibi defense based on Owens's testimony that he was not at the crime scene and provided he could locate him, the testimony of Blackman who would have testified to his version of the alibi defense. *Id.* at 139. And

true, a reasonable doubt defense and an alibi defense are not inconsistent defenses. But instead of presenting both defenses, Rago reasonably made a strategic decision to focus on attacking the credibility of the State's two eyewitnesses, which he did fairly effectively, despite the ultimate conviction. *Id.* at 49,139. Based on the testimony presented and the present record, it cannot be said that this decision was deficient under *Strickland*.

D. Prejudice

Even if Rago's omissions constitute deficient performance, Owens has failed to demonstrate *Strickland* prejudice. In assessing prejudice, "[i]t is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Instead, "*Strickland* asks whether it is 'reasonably likely' the result [of the trial] would have been different." *Richter*, 131 S.Ct. at 792 (quoting *Strickland*, 466 U.S. at 696). To make this showing, Owens need not simply demonstrate that counsel's deficient conduct "more likely than not altered the outcome" in the case, but rather "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 131 S.Ct. at 792.

*13 As discussed above, Blackman could not provide an alibi for Owens on the night of Nelson's murder because Blackman could not recall if he was with Owens that night. If Blackman, one of Owens's good friends, had offered the same equivocal testimony he offered at the hearing at Owens's trial—and from what counsel knew at the time from Zupancic's telephone conversation with him, that seemed a likely possibility—there is no reasonable probability that

Owens would have been acquitted given the evidence that was presented in support of Owens's guilt. Indeed, Blackman's ambivalent testimony must be considered weak when compared to the evidence the State marshaled at Owens's trial. At trial, Johnnie and Evans both positively identified Owens as Nelson's murderer, and their accounting of the event was fairly consistent with each other. Johnnie testified that he saw Owens hit Nelson from a few feet away, and at a time when it was not yet totally dark and the area in front of the liquor store was illuminated by street lights and lights near the liquor store's front doors. He also saw Owens's face immediately prior to and after the attack. Johnnie's post-attack description of the offender and his clothing was consistent with Owens's actual appearance and Evans's testimony regarding Owens's appearance that night. Shortly after Nelson's murder, Johnnie selected Owens's photo from a photo array as the murderer, and he identified Owens in both a lineup and in court, expressing a high level of certainty in his identifications. R. 152-1 at 161-63 (state appellate court's analysis of the reliability of Johnnie's eyewitness identification).

Add to that Evans's testimony that on that evening, there was sufficient light to see the events in question, and his identification of Owens as Nelson's murderer. True, he twice identified the wrong photo when asked to select the photo of Owens from the photo array that he viewed at the police station, but he successfully identified Owens from a photo of the lineup that he viewed at the police station after Owens's arrest, when he identified Owens to police as the murderer.

Accordingly, given this evidence, even if counsel had presented Blackman's testimony, it cannot be said that given the evidence demonstrating that Owens killed Nelson, there is a reasonable probability that the result of Owens's trial would have been different. *See Brady*, 711 F.3d at 828 (holding that failure to present "marginally exculpatory" testimony did not prejudice habeas petitioner).

In the end, Owens received the constitutionally effective counsel that he was entitled to receive under the Sixth Amendment and the Court makes the following findings:

• Owens failed to argue to the state courts in one complete round of state court review that counsel was ineffective for failing to investigate Tasha and other potential alibi witnesses. And regardless of whether the claim has been properly preserved for federal habeas review, there is no reasonable probability that the result of Owens's trial would have been different had Tasha's testimony or the testimony of the other "alibi" witnesses had been presented. Even Owens testified at the hearing that all of these "alibi" witnesses (Tasha, Karee Williams, Jamil, Greg, Kenworth, and Will) only placed Owens at some location up to 5 p.m. or earlier, which does not aid an alibi for a murder that occurred at 8:30 p.m.

• Counsel did not render deficient performance when he failed to investigate Minor as a potential alibi witness because despite Owens's claim to the contrary, the Court finds Owens never told Rago about Minor. Rago could not have been deficient for failing to investigate a witness of whom he was not aware.

• Counsel conducted a reasonable investigation into Blackman as a potential alibi witness, and when Blackman proved uncooperative and revealed that he had, at best, marginally exculpatory testimony, counsel reasonably decided to focus his efforts on presenting a reasonable doubt defense and attacking the credibility of the State's eyewitnesses. Nor can Owens demonstrate that he would have been acquitted had counsel called Blackman to testify at trial given his equivocal testimony.

• Finally, despite Owens's claim of the insufficiency of Rago's representation, an examination of counsel's overall efforts reveals that the work Rago performed for Owens, while perhaps curtailed in some respects, cannot be deemed deficient under *Strickland*. Nor did Owens suffer prejudice from counsel's omissions given the ambivalent testimony Rago is faulted for not presenting and the evidence presented in support of Owens's guilt at trial.

II. Counsel's Advice to Owens Regarding Owens's Right to Testify

A. Factual Background

*14 At the evidentiary hearing, Owens testified that at one or two meetings before trial, he told Rago that he wanted to testify that he was not at the scene of the murder. R. 126 at 120. Owens said that he had another discussion with Rago during the trial about testifying, but Rago told him that given William Evans's "botched" testimony regarding the photo array identification, Owens's testimony was

unnecessary. *Id.* at 121-22. According to Owens, Rago never explained why Owens should not testify, nor was there any other discussion with Rago regarding his right to testify. *Id.* at 122, 126-27 But yet he agreed to follow Rago's recommendation that Owens not testify. *Id.* at 122-23. The trial judge also, Owens claimed, never asked him whether he wanted to testify. *Id.* at 123.

During cross-examination, Owens admitted that Rago simply recommended that he not testify and that Owens followed Rago's recommendation. *Id.* at 206-07. He further added during questioning by the Court that Rago never absolutely told him that he could not testify or that Owens had no right to testify, but Owens inferred from Rago's discouraging him from testifying that he should not testify; Owens nevertheless insisted that he did not know that he would have been allowed to testify if he had wanted to. *Id.* at 222-25. He acknowledged, however, that in his post-trial correspondence to Rago he never mentioned that Rago prohibited him from testifying or that he had wished to testify. *Id.* at 148, 152-53; *see also* R. 140-3 at 4-10. Owens also admitted that he had a stepfather who was a criminal defense attorney, R. 126 at 98, 215-16, and that Owens, through a number of misdemeanor and felony arrests, had prior experience with the criminal justice system, *id.* at 184-87.

Rago testified that he did not specifically recall advising Owens regarding his right to testify at trial, but his general practice would have been to discuss that right with a client multiple times during the course of his representation. R. 125 at 60, 153. Rago said that he would have even specifically advised

Owens of that right after the State rested its case and before the defense rested theirs. *Id.* According to Rago, the general practice of the trial judges at the Markham County courthouse was to admonish criminal defendants of their right to testify, but if a trial judge omitted that admonishment, then either the prosecutor or Rago would remind the judge to ask the defendant about it. *Id.* at 65. Although Rago acknowledged that the record did not reflect an on-the-record admonishment of Owens regarding his right to testify, Rago believed that the trial court admonished Owens of his right to testify off the record.[11] *Id.* at 63, 187.

Rago reiterated that when representing clients, he would advise them of their right to testify and further advise them that the decision to testify was theirs. *Id.* at 154. Thus, if Owens had demonstrated a desire to testify, Owens would have testified. *Id.* at 150 ("If [Owens] wanted to testify, I would not block him in any way, shape, or form."), 151 ("The ultimate decision [of] whether or not [Owens] [would] testify rests with him "); 154 (stating the client gets the "final say" on whether he testifies at trial). Rago denied that he ever forbid Owens from testifying. *Id.* at 155.

B. *Strickland* Claim

Owens's claim regarding his right to testify has evolved since his state court litigation. On direct appeal, Owens argued that Rago "failed to allow [him] to testify" and "did not put [him] on the stand to testify on his own behalf." R. 152-1 at 37-38. In his postconviction petition, Owens alleged that he received ineffective assistance when Rago "would not

allow [Owens] to testify at trial." R. 152-2 at 25. According to Owens's state petitions, Rago "forbid [him] [from] testify[ing][on] his own behalf." *Id.* at 36. Owens elaborated on this claim with his own affidavits in which he averred that "[a]lthough [he] felt [he] needed to testify at trial ... Rago told [him] not to worry, meaning that [Owens] would be acquitted." R. 152-2 at 98. Owens alleged that neither Rago nor the trial judge explained to him that he had a right to testify at trial and that the decision regarding whether to testify was his. *Id.* And had he known it was his decision to testify, Owens says, he would have testified that he did not murder Nelson and that at the time, he was with Minor and Blackman. *Id.* To further support this claim, Owens presented the affidavit of Owens's mother in which she stated that she informed Rago on several occasions that Owens wanted to testify about his alibi defense, but that Rago decided not to "allow" Owens to testify because the State's case against Owens was "so weak ... that he would never get convicted." *Id.* at 59-60. Owens then brought the claim raised in his state court proceedings in this federal habeas proceeding, claiming that Rago forbade him from testifying and that neither Rago nor the judge explained that the decision to testify was his alone to make.

***15** Owens now argues in his post-hearing brief that although Rago "never specifically told [him] not to testify, the import of his legal opinion was such that [Owens] believed that he could not testify." R. 140 at 113. Thus, it seems from Owens's post-hearing brief and his testimony at the evidentiary hearing that Owens claims now not that counsel prevented him from testifying at trial, but that counsel discouraged

him from testifying, and that this advice amounted to ineffective assistance of counsel.[12] *Id.* at 113-14. The Warden argues that Owens's claim regarding his right to testify, as now formulated, is procedurally defaulted because Owens never argued to the state courts that, while he made the ultimate decision whether to testify, counsel's advice to him regarding testifying amounted to constitutionally deficient advice. R. 150 at 19. Owens failed to respond to the Warden's argument.

"A state petitioner seeking a writ of habeas corpus in federal court must first exhaust the remedies available to him in state court, thereby giving the State [courts] the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Cheeks v. Gaetz,* 571 F.3d 680,685 (7th Cir.2009) (internal citation and internal quotation marks omitted). To afford the state courts this opportunity, a habeas petitioner must fully and fairly present his constitutional claim to the state courts before seeking relief in federal court. *Gray v. Hardy,* 598 F.3d 324,327 (7th Cir.2010). Fair presentment of a federal claim to the state courts contemplates presentment of both the claim's operative facts and controlling legal principles. *Gonzales v. Mize,* 565 F.3d 373,380 (7th Cir.2009).

Here, the operative facts underlying Owens's current claim—counsel misadvised Owens not to testify or gave him advice which wrongly influenced his decision not to testify—are wholly different than the operative facts underlying Owens's original claim—counsel forbade or prevented him from testifying. The state courts were never presented with the operative facts that form the basis of the claim that Owens currently

advances, and thus never had a full and fair opportunity to address Owens's claim that counsel's advice regarding Owens's decision whether to testify was ineffective assistance under *Strickland*. Accordingly, Owens's presentment of his current claim for the first time in the Court and failure to present the claim's operative facts at all in the state courts renders it procedurally defaulted on federal habeas review.

But even if the Court were to evaluate Owens's current claim on the merits, it lacks merit in any event. "[I]ncorrect advice that induces a defendant to waive his right to testify can constitute ineffective assistance." *Starkweather v. Smith*, 574 F.3d 399, 403 (7th Cir.2009) (emphasis omitted). To prevail on this claim, Owens must demonstrate that counsel's advice fell below an objective standard of reasonableness, and that there is a reasonable probability that had Owens testified he would have been acquitted of murder. Owens can show neither.

Owens testified that prior to trial, he told Rago about his desire to testify, and Rago stated his opinion that Owens need not testify given the weaknesses in the State's case. R. 126 at 120, 206. Rago at no time told Owens that he could not testify. *Id.* at 222. Owens trusted counsel's judgment, agreed to follow Rago's recommendation, and decided not to testify. *Id.* at 207. Owens testified that during the trial, he again discussed his right to testify with Rago, and at that time, Rago recommended that Owens need not testify, particularly given Evans's "botched" photo array selection. *Id.* at 121. Owens again agreed to follow Rago's recommendation, believing that his testimony was not critical evidence given the State's evidence,

and in none of his post-trial correspondence with Rago did he mention that he had wanted to testify or that he disagreed with counsel's recommendation that he not testify. *Id.* at 122-23, 222.

*16 There is no indication from Owens's testimony that Rago misinformed him of his rights or his chances of acquittal. Indeed, Rago testified that he would never have predicted an outcome of a trial to a client. R. 125 at 148 ("I never, ever predict an outcome regarding either a jury trial or a bench trial with my clients."). Thus, the Court is left with Owens's allegations that counsel advised him not to testify and pursuant to that recommendation, Owens decided not to testify. Even assuming Rago advised Owens against testifying, Owens has not demonstrated that this advice would have been objectively unreasonable under the circumstances as they existed at the time. Rago may have believed that it was better strategy to focus Owens's defense on aggressively attacking the credibility of the State's eyewitnesses by challenging the reliability of their identifications. *Id.* at 149; *see also R.* 112-1 at 100-17 (Rago's closing argument). Or he may have believed the State's case was weak, particularly after Evans's testimony regarding the photo array, and decided to rely on that trial strategy rather than also running the risk of Owens's testifying and relying on Owens's uncorroborated alibi defense. Such a decision was not unreasonable and outside the bounds of reasonable professional assistance. *See United States ex rel. Parker v. Chandler,* No. 09 C 4321, 2011 WL 221834, at *10 (N.D.Ill. Jan. 24, 2011).

Nor can Owens demonstrate that he has met *Strickland* 's prejudice requirement. Even if Owens

had testified that he was not present at the scene at the time of the murder, there is no reasonable probability that he would have been acquitted. His alibi was uncorroborated—Blackman would not have been able to confirm Owens's whereabouts at the time of the murder. Johnnie and Evans testified that they saw Owens commit the murder, and despite Rago's attempts to discredit their identifications, the trial court found their testimony credible. It cannot be said that if Owens's unsupported and self-serving testimony that he was with friends that night had been presented that would have resulted in the trial court's acquittal of Owens for Nelson's murder. Because Owens cannot demonstrate either counsel's deficient performance or prejudice resulting from counsel's performance, Owens cannot prevail on his current claim regarding his right to testify.

III. Certificate of Appealability

Because Owen's ineffective assistance of counsel claim lacks merit, his petition for a writ of habeas corpus is denied. Rule 11(a) of the Rules Governing § 2254 Cases provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." To obtain a certificate of appealability, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This demonstration "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted); *see also*

Lavin v. Rednour, 641 F.3d 830, 832 (7th Cir.2011). And where a petition is disposed of based on a procedural bar, without reaching the merits of the underlying constitutional claims, a certificate of appealability should issue only if reasonable jurists would fmd the adjudication of the antecedent procedural ruling "debatable." *Slack,* 529 U.S. at 484-85; *see also Lavin,* 641 F.3d at 832.

The Court's earlier denial of Owens's inordinate delay and Fourth Amendment claims rests on well-settled precedent governing procedural default and the non-cognizability of these claims in § 2254 proceedings. The Court's further determination that Owens's claim regarding the state trial court's admission of the photo array and lineup identification was procedurally defaulted is not a conclusion that reasonable jurists could debate. Nor is the Court's rejection of Owens's improper extrajudicial findings claim on the merits a finding that is debatable. Finally, the Court's denial of both grounds of Owens's ineffective assistance of counsel claim rests on well-settled precedent governing procedural default. Moreover, based on Rago's and Zupancic's credible testimony regarding their investigation into Owens's alibi defense, Blackman's credible testimony regarding the limited extent to which he remembered being with Owens the night of the murder, and Rago's credible testimony regarding his advising of Owens about his right to testify, Owens has not demonstrated that the application of *Strickland* to Owens's ineffective assistance claim presents questions that jurists of reason could debate should be resolved in a different manner. Accordingly, certification of any of Owen's habeas claims for appellate review is denied.

Conclusion

*17 For the foregoing reasons, Owens's petition for a writ of habeas corpus is denied, and the Court declines to issue a certificate of appealability for any of his claims.

Footnotes

1. On January 14, 2013, Owens's § 2254 petition was reassigned to the undersigned judge's calendar. R. 108.
2. The police did not obtain a warrant for Owens's arrest. Owens filed a motion to quash his arrest, arguing that the police lacked probable cause to effect his warrantless arrest on the homicide charge. The state appellate court found that based on Johnnie and Evans' photo array identifications, the police had probable cause to arrest and detain Owens for Nelson's murder. R. 152-1 at 151-52.
3. The Court's prior opinion recounts the claims that were raised in each round of review in Owens's direct appeal. *See Owens*, 2012 WL 1416432, at *5-6 (Pallmeyer, J.).
4. Owens's initial *pro se* postconviction petition was not included in the exhibits the Warden submitted to the Court
5. Minor and Bertha Marie Owens died in 2007 and 2011, respectively. R. 126 at 62-65.
6. Citations to the transcripts of the evidentiary hearing are noted as R. 125 (the transcripts from March 18, 2013) and R. 126 (the transcripts from March 19,2013).
7. Owens said at the hearing that when he gave Rago the names of his friends, he only gave Rago their first names because he did not know their last names. Through her investigation, Investigator Zupancic was later able to identify Tasha as Tasha Dugar. R. 125 at 136-38; R. 126 at 17-24.
8. Owens makes the argument that Blackman could not say with certainty that he was *not* with Owens at the time of the murder. Such testimony would not have been helpful Blackman's trial. The only helpful testimony would be if Blackman could affirmatively testify that he *was* with

Owens at the time of the murder. Blackman could not so testify.

9. Blackman provided different information in the affidavits attached to Owens's postconviction petitions. But Blackman's testimony at the evidentiary hearing effectively disavowed the averments in those affidavits
10. Blackman acknowledged later in his testimony that Owens's mother asked him if he would testify for Owens if it became necessary. R. 125 at 278
11. The Court finds Rago's testimony in this regard somewhat perplexing. But although the Court does not credit Rago's recollection regarding the trial court's off-the-record admonishment to Owens regarding his right to testify, that does not change the result here.
12. Owens's earlier claim that he did not know that he had the right to testify is belied by the testimony he gave at the evidentiary hearing. According to Owens, he agreed to Rago's recommendation that he not testify, meaning that he necessarily was aware of his right to testify. R. 126 at 206-07.

2014 WL 1416432
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

UNITED STATES of America, ex rel. Larry OWENS, Petitioner,

v.

Gerardo ACEVEDO, Warden, Hill Correctional Center, Respondent.

No. 08 C 7159 | April 23, 2012 | As Amended May 29, 2012

Attorneys and Law Firms
Robert S. Nathan, Law Office of Robert S. Nathan, Chicago, IL, for Petitioner.
Garson Steven Fischer, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

REBECCA R. PALLMEYER, District Judge.

*1 At a bench trial on November 8, 2000, Petitioner Lawrence Owens ("Owens" or "Petitioner") was convicted of first degree murder for beating Ramon Nelson to death with a baseball bat outside a liquor store. Owens was sentenced to 25 years in prison. He challenged his conviction in an unsuccessful direct appeal and by way of a petition for postconviction relief; his state remedies have been exhausted. In this action pursuant to 28 U.S.C. § 2254, Owens raises five

grounds for relief: (1) due process violations for the delay in the state trial court's resolution of his postconviction relief petition; (2) lack of probable cause for his arrest; (3) admission of improperly suggestive photo array and line-up evidence at trial; (4) the trial court's reliance on improper "extrajudicial" findings regarding Owens's motive, based on evidence not produced at trial; and (5) ineffective assistance of counsel for his trial counsel's failure to investigate Petitioner's alibi or call alibi witnesses to testify, and for denying Owens his right to testify on his own behalf. For the reasons explained here, the court denies the petition with respect to Claims 1- 4, but concludes that Petitioner is entitled to an evidentiary hearing of limited scope on his ineffective assistance on counsel claims (Claim 5).

FACTUAL BACKGROUND

On habeas review, this court presumes the facts as found by the state court correct, absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). The following facts are derived from the Illinois appellate court's order affirming Petitioner's conviction on direct appeal. (Order, *People v. Owens,* No. 1-01-0341 (Ill.App. 1st Dist. Dec. 4, 2002) (hereinafter, "Direct Appeal Order"), Ex. D to Resp't's Answer.)

I. **Evidence at Trial**

On the evening of September 22, 1999, sometime after 8:00 p.m., an assailant, later identified by eyewitnesses as Owens, attacked seventeen-year-old Ramon Nelson with a baseball bat outside a liquor store and lounge in Markham, Illinois, resulting in

Nelson's death. *(Id.* at 5-7, 11-12, 14.) Maurice Johnnie, one of the two eyewitnesses who appeared at trial, testified that he was in the passenger's seat of his own car with two friends, parked about ten feet from the entrance to the liquor store and facing that direction. *(Id.* at 6.) It was not quite dark yet, and the front of the store was illuminated by streetlights and lights from the liquor store's front door. *(Id.)* Eventually, one friend entered the liquor store, leaving Johnnie and the other friend, Johnny Morgan, in the car. *(Id.)*

While Johnnie and Morgan waited in Johnnie's car outside the liquor store, Nelson approached the car on a bicycle and spoke to Morgan, who was seated on the driver's side. *(Id.)* Johnnie did not know Nelson. *(Id.)* After speaking to Morgan for three or five minutes, Nelson proceeded down the sidewalk, away from the passenger's side of the car, towards the entrance of the liquor store. *(Id.* at 6-7.) Johnnie then observed a man walking down the sidewalk in the opposite direction and toward Nelson. *(Id.* at 7.) Nelson attempted to turn his bicycle around, but the man caught up with him and hit Nelson on the head with a baseball bat. *(Id.)* Nelson fell from his bicycle into the doorway of the store, where the assailant hit him in the head a second time, forcefully and with both hands on the bat. *(Id.)* After the second hit, the attacker turned and walked back in the direction from which he had come. *(Id.)* Johnnie testified that he saw the attacker's face on his approach, but got his best look after the attacker had finished his assault. *(Id.* at 9.) Johnnie and Morgan then went to check on Nelson, found him unconscious and groaning, and, at Morgan's insistence, took him to the hospital in Johnnie's car. *(Id.* at 7.) Nelson died in the hospital

the next day as a result of multiple skull fractures. *(Id.* at 14; Markham Police Department Case Report, Brief of Defendant—Appellant Lawrence Owens in *People v. Owens,* No. 1-01-0341 (hereinafter "Peter's Direct Appeal Brief'), Ex. A to Respites Answer, at A-7 to-8.)

*2 The second eyewitness to testify at trial was William Evans. (Direct Appeal Order at 10.) Evans, who had a previous drug conviction and was in custody on another drug charge at the time of trial, acknowledged that he was testifying in return for a recommendation of probation. *(Id.* at 10-11.) Evans testified that he was on the same block as the liquor store, and that he spoke to Nelson, whom he knew from the neighborhood, for about a half hour before the attack. (*Id.* at 11.) After their conversation, Evans saw Nelson proceed toward the entrance of the liquor store on his bicycle. *(Id.)* At the time the attack began, Evans was retrieving a bucket at the northeast corner of the block in order to wash a car. *(Id.)* Evans was first made aware of the attack when he heard a sound like wood splitting. (*Id.* at 12.) Evans looked around the corner of the building and saw the assailant hitting Nelson with the bat. *(Id.)* While Evans did not know the assailant, he recognized the assailant as someone who had visited the liquor store and lounge in the past. *(Id.)*

Evans hollered, "hey, what is going on," whereupon the assailant and another man ran off past him. *(Id.)* Following the attack, Evans went to see Nelson, and helped put Nelson into Johnnie's car. (*Id.* at 13.) Immediately after the incident, Evans briefly spoke with police officers, described the approximate height and weight of the two individuals, and informed them

that he had recognized the assailant from the neighborhood. *(Id.)*

Johnnie did not speak with police officers on the night of the incident (*id.* at 8), and he gave a false name and address when he dropped Nelson off at the hospital. (Markham Police Department Case Report.) Responding officers at the scene of the crime learned the license plate number of the car that transported Nelson to the hospital, however, and Detective White was able to identify Johnnie from the vehicle's registration. *(Id.)* Detective White contacted Johnnie, who agreed to an interview at the Markham police station on September 28, 1999, a week after the incident. *(Id.)* Johnnie described the attacker as a large black male, approximately 6'2" to 6'4" weighing 220 to 240 pounds, and dressed in brown. (Direct Appeal Order at 8.) Detective White compiled a photo array based on Johnnie's description. *(Id.* at 9.) Johnnie selected Owens's photo from the array as the photo of the individual who attacked Nelson. Detective White testified at trial that he never said the assailant was in the array and never made any suggestive remarks regarding the array. *(Id.)*

Evans also viewed the photo array at the station on September 28, 1999, and also described the assailant as a large black male, dressed in brown or tan. (*Id.* at 3.) Detective White testified that Evans identified Owens as the person who attacked Nelson. *(Id.)* At trial, however, when asked by the prosecutor which photo in the array he had identified as the assailant's, Evans pointed to a photograph of a person other than Owens. (*Id.* at 12 .) When given another opportunity by the prosecutor, Evans again failed to select Owens's photograph. *(Id.)*

*3 Following the photo identifications, Detective White directed his fellow officers to be on the lookout for Owens. (*Id.* at 4.) No arrest warrant was issued, but Detective White informed Officer Mike Alexander on September 29, 1999, that Owens, also known as "Big 0," was wanted in connection with a murder investigation. *(Id.)*

On October 26, 1999, Officer Alexander observed a blue Mercury Topaz speed by his unmarked squad car, traveling fifty miles per hour in a twenty-mile-per-hour zone. (*Id.* at 4.) According to Officer Alexander, the car did not stop when he activated his emergency lights and siren. *(Id.)* Instead, the Topaz accelerated through a stop sign and proceeded northbound, with Alexander in pursuit. *(Id.)* When the Topaz eventually pulled over, Owens exited the vehicle and ran northbound through a crosswalk. *(Id.)* Alexander gave chase and caught Owens a block and a half away. *(Id.)* At a hearing on Owens's unsuccessful motion to quash his arrest, Owens denied that he was speeding or that he ran a stop sign. (*Id.* at 2-3.) He claimed that he did not see the squad car until thirty seconds before he pulled over, and that he walked, not ran, from the car. (*Id.* at 3.) Owens did not deny, however, that he was driving the car. *(Id.)* Alexander placed Owens under arrest and transported him to the Markham police station when Owens could not produce a driver's license. (*Id.* at 4-5.)

On reaching the station, Alexander informed Detective White that Owens was in custody. (*Id.* at 5.) On October 27, 1999, witnesses Johnnie and Evans independently selected Owens out of a five-man lineup organized by Detective White. *(Id.)* Detective

White acknowledged that Owens was the only man who appeared in both the lineup and the photo array, and Johnnie acknowledged at trial that Owens was the "biggest and bulkiest" of the people in the lineup Johnnie asserted, however, that the identification was not based on height because everyone in the lineup was seated. (*Id.* at 8.) Prosecutors also showed Evans a photograph of the lineup at trial and asked Evans to pick out the individual he selected at the station. (*Id.* at 12.) Evans pointed out Owens in the lineup photograph after having failed to identify Owens as the person whom he had selected from the photo array. *(Id.)*

Following the witness testimony, the parties presented a series of stipulations regarding Nelson's cause of death, the fact that Nelson had forty bags of cocaine on him when attacked, and that a transcript of Evans's grand jury testimony was accurate. (*Id.* at 15.) After these stipulations, the state rested. *(Id.)* The court denied Owens's motion for a directed finding, and the defense rested without presenting any evidence. *(Id.)*

After closing arguments in Owens's bench trial, Judge Joseph Macellaio of the Circuit Court of Cook County stated:

After hearing this case, I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [Owens] knew he was a drug dealer. [Owens] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

*4 (Excerpt of Trial Tr., App. to Peter's Direct Appeal Brief, at A-4 to-5.) It is unclear from the record what evidence the judge considered in support of this finding. Certainly, there was evidence that Nelson dealt drugs—he had a significant quantity of cocaine in small bags on his person. There is also evidence that at least one of the prosecution's two witnesses was involved in the illegal drug trade. No other record evidence suggests that Owens knew Nelson was a drug dealer, however, or that Owens himself was involved in drug trade. The judge sentenced Petitioner to twenty-five years' imprisonment. (*Id.* at A-6.)

III. Postconviction Affiant Testimony

In support of his ineffective assistance of counsel claims, Owens provides his own affidavits, and those of Tim Blackman, Sheila Minor, and his mother, Bertha Marie Owens. Owens has presented two sets of these affidavits. He filed the first set with the state court on September 11, 2003, in support of his *pro se* state petition for postconviction relief. The affidavits in the second set were prepared on dates ranging from 2006 to 2009. It is not clear from the record what occasioned the second set of affidavits or whether counsel participated in preparation of any of the affidavits.

Owens claims that he is innocent of the crime for which he was convicted. (Aug. 26, 2003 Owens Aff. ¶ 2, Ex. A to Pet'r's Reply.) He further asserts that he repeatedly told his trial counsel, Frank Rago, that he was innocent, that he had an alibi, and that he had alibi witnesses (Blackman and Minor). (*Id.* ¶ 3.) According to Owens, Rago promised that he would

investigate Owens's alibi and interview his alibi witnesses, and would call Owens and the alibi witnesses to testify on Owens's behalf. (*Id.* ¶ 4.) Despite these assurances, Owens contends, Rago failed to investigate or interview the alibi witnesses, and in fact forbade Owens from testifying on his own behalf. *(Id.)*[1] Owens explains that although he wanted to testify, Rago told him "not to worry, meaning that [Owens] would be acquitted." (Jan. 11, 2008 Owens Aff. ¶ 4.) Owens asserts that neither Rago nor Judge Macellaio explained that he had the right to testify or that the decision on whether to testify was Owens's alone. (*Id.* ¶¶ 5-6.) According to Owens, had he known this was his decision to make, he would have testified, and explained that he was innocent and had an alibi. (*Id.* ¶ 7.)

In his affidavit, Tim Blackman provides an account of his time with Owens on September 22-23, 1999. According to Blackman's account, at 2:30 p.m. on September 22, 1999, he and Owens were in front of Owens's house in Markham, Illinois when Sheila Minor drove by and asked them to help her assemble a dinette set later that evening. (July 18, 2003 Blackman Aff. ¶¶ 2-3, Ex. B to Pet'r's Reply.) Blackman and Petitioner met Minor at her father's house, down the street from Owens's home, at 6:15 p.m. (*Id.* ¶ 4.) From there, Minor gave Blackman and Owens a ride to Minor's home in Sauk Village, Illinois. (*Id.* ¶ 5.) They arrived at Minor's home at 7:20 p.m., assembled the dinette set, and then spent the remainder of the evening talking, eating, and watching television. (*Id.* ¶ 6.) Instead of heading back to Markham that evening, Blackman and the Owens spent the night at Minor's home, staying until 6:00 a.m. the following morning. (*Id.* ¶¶ 8, 9.) Blackman

says that prior to trial, he assured Owens's mother that he would testify to these events, but Owens's attorney never contacted, interviewed, or asked Blackman to testify. (*Id.* ¶¶ 10, 11.)

*5 Tim Blackman's second affidavit, prepared several years later, provides an account similar, though not identical, to the one set forth in his initial affidavit. According to that second affidavit, Blackman and Owens began their day at Blackman's home, not at Owens's home, and returned at 8:00 a.m., not 6:00 a.m., the following day. (Aug. 23, 2006 Blackman Aff. ¶¶ 7, 12, Ex. G to Pet'r's Reply.)

Sheila Minor also provided affidavits recounting her time with Owens and Blackman on September 22-23, 1999, the details of which mirror those set forth in Blackman's first affidavit. (July 18, 2003 Minor Aff., Ex. C to Pet'r's Reply.) Like Blackman, Minor was never contacted or interviewed by Owens's attorney and was never called to testify on Owens's behalf. (*Id.* ¶ 11.) Minor's second affidavit repeated her earlier account. (Jan 22, 2007 Minor Aff., Ex. H to Pet'r's Reply.)

Finally, Petitioner's mother, Bertha Marie Owens, provided affidavits concerning her active involvement in Petitioner's defense. Ms. Owens asserts that she told Frank Rago numerous times that Blackman, Minor, and her son wanted to testify and could provide an alibi defense. (Sept. 10, 2003 Ms. Owens Aff. ¶ 3, Ex. D to Pet'r's Reply.) She supplied Rago with Blackman's and Minor's names and contact information, but despite his numerous assurances about presenting the alibi defense, he never interviewed them or investigated the alibi. (*Id.* ¶¶ 4-

5.) According to Ms. Owens, Rago decided not to use the alibi defense because, he told her, the prosecutor's case against her son was too weak and he would never be convicted. (*Id.* ¶ 6.) Ms. Owens's second affidavit presents the same information. (Oct. 31, 2006 Ms. Owens Aff., Ex. I to Pet'r's Reply.)

PROCEDURAL HISTORY

Following trial, Owens appealed to the Illinois Appellate Court, First District. On direct appeal, Petitioner argued (1) that Petitioner was not proven guilty beyond a reasonable doubt; (2) that Petitioner's arrest and the lineup evidence should have been suppressed because the police had no probable cause to arrest for the murder charge; (3) that the photo array and lineup evidence should have been suppressed because they were overly suggestive; (4) that the judge's extrajudicial findings concerning Owens's motive for the crime denied Petitioner a fair trial; (5) that Petitioner was denied the effective assistance of counsel; and (6) that the sentence was excessive. (Pet'r's Direct Appeal Brief at 15, 25, 30, 32, 34.) Concerning Owens's ineffective assistance of counsel claim, his brief noted that his claim was limited on direct appeal to evidence in the trial record, which precluded consideration of evidence of his desire to testify or the availability of alibi witnesses. (*Id.* at 33 n. 3.) In a 2-1 decision, the Illinois Appellate Court affirmed the trial court's judgment on December 4, 2002. (Direct Appeal Order at 34.)

The court concluded that police had probable cause for both the warrantless arrest for the traffic violations and the subsequent arrest for murder based on the eyewitness identifications. (*Id.* at 17-18.)

Further, the court held that Owens had waived his right to the admission of the photo-array and lineup identifications by failing to raise a trial objection, and that in any event, Owens failed to establish that the identification procedures were impermissibly suggestive. (*Id.* at 19-22.) Concerning the sufficiency of the evidence, the court noted that the prosecution could carry its burden through the testimony of a single, credible eyewitness. (*Id.* at 22.) Although the court noted that Evans's testimony was "severely called into question"—both by his misidentification of Owens's photograph in the photo array at trial and by his deal to testify in exchange for a recommendation of lenient sentencing in his own criminal trial—the court concluded that "Johnnie's identification testimony is reliable and sufficient enough to support the trial court's guilty verdict." (*Id.* at 25-26.) In light of the identifications, the majority concluded that "the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error." (*Id.* at 27.) The dissenting judge disagreed with this analysis; the dissent observed that the trial judge had "manufactur[ed], suppl[ied], and interject[ed] its own evidence into a trial and then affirmatively stat[ed] on the record that this manufactured evidence constituted the basis of its verdict." (*Id.* at 37 (South, J., dissenting).) Finally, the Illinois appellate court rejected Owens's ineffective assistance of counsel claim on direct appeal. In the absence of the post-trial affidavit testimony mentioned above, the court concluded that Owens failed to point to anything in the trial record "which indicates that defense counsel failed to investigate the case" or "that defendant ever expressed a desire to testify or that defense counsel

frustrated defendant's request to testify." (*Id.* at 31-32 (majority opinion).)

*6 Owens filed a Petition for Leave to Appeal ("PLA") with the Illinois Supreme Court on January 8, 2003. (Lawrence Owens's Pet. for Leave to Appeal, Ex. E to Resp't's Answer.) Owens sought review only of the appellate court's conclusion that the evidence was sufficient for conviction and that the trial court's extrajudicial finding concerning Owens's motive was harmless error. (*Id.* at 1.) Petitioner also attempted to preserve other errors not raised in the PLA by stating that "several other instances of trial error were fully briefed in the Appellate Court, but space limitations here prevent discussion. If this Petition is granted, defendant wishes to preserve those issues which were presented as well in the appellate court, in a supplemental brief." (*Id.* at 3-4.) The Illinois Supreme Court denied Owens's PLA on April 2, 2003. *People v. Owens*, 203 I11.2d 563, 273 Ill.Dec. 142, 788 N.E.2d 733 (2003).

After his unsuccessful direct review concluded, Owens pursued further review by way of a petition for post-conviction relief.

Owens filed a *pro se* petition on September 10, 2003. (Pet. for Writ of Habeas Corpus (hereinafter "Habeas Pet."), at 3.)[2] A number of years later, counsel filed a supplemental petition for posconviction relief on Owens's behalf on June 16, 2008. Owens claimed that he was deprived of effective assistance of counsel because Rago, his trial counsel, neither investigated his alibi nor called alibi witnesses to testify at trial, and because Rago forbade Petitioner from testifying on his own behalf. (Supplemental Pet. for Post–

Conviction Relief, Ex. G to Resp't's Answer, at 1-2.)[3] In support of his petition, Owens submitted the post-trial affidavit testimony discussed above.

While his state postconviction petition was still pending, Owens filed the instant habeas petition on December 15, 2008. Respondent moved to dismiss the petition due to Petitioner's failure to exhaust his state court remedies. (Motion to Dismiss [18].) Owens cited "inordinate delay" to explain his decision to file a federal habeas petition before his state petition, then pending more than five years, had been resolved. (Habeas Pet. at 3.) This court initially delayed ruling on the motion to dismiss, in the hope that completion of the state court process would render Respondent's motion moot. On March 9, 2010, however, the court denied Respondent's motion, noting that despite Petitioner's diligence "in making contact with his lawyers, seeking information from them, and urging action," the state trial court had taken more than six years to rule on the petition, and no further ruling was in sight. (Mar. 9, 2010 Minute Order [24].) Although some of the delay was evidently attributable to his appointed counsel, this court noted that the state trial court was also responsible for delays, for reasons that appeared unrelated to any request made by Owens or his attorneys or by the state. (*Id.*)

During the pendency of this federal habeas petition, Petitioner's state postconviction petition continued to wind through the state courts. In its oral ruling, rendered on September 29, 2009, the state trial court explained that because Petitioner raised ineffective assistance of counsel claims on direct appeal, the postconviction petition claims were barred by *res judicata*. (Pet'r's Postconviction Appeal Brief, at 12;

Certified Report of Disposition in *People v. Owens*, No. 99 CR 25287-01, App. to Pet'r's Postconviction Appeal Brief, at A-7.) Petitioner appealed this decision to the Illinois appellate court, arguing that the trial court erred in dismissing his petition without an evidentiary hearing. (Pet'r's Postconviction Appeal Brief at 1.) Further, Petitioner asserted that the court erred in applying the doctrine of *res judicata* because Petitioner's state postconviction petition presented evidence outside the trial record, not available to the Illinois appellate court or the Illinois Supreme Court on direct appeal. (*Id.* at 27.)

*7 The Illinois appellate court denied Petitioner's appeal on March 21, 2011. (Summary Order in *People v. Owens*, No. 1— 09-2626 (Ill.App. 1st Dist. Mar. 21, 2011) (hereinafter "Postconviction Order"), Ex. M to Supplemental Record.) The court acknowledged that under Illinois law, *"[r]es judicata* does not bar a defendant from raising an ineffective assistance claim in a petition for postconviction relief if the claim is based on evidence outside the record." (*Id.* at 2 (citing *People v. Ward*, 187 Ill.2d 249, 257, 240 Ill.Dec. 636, 718 N.E.2d 117, 124 (1999)).) Nevertheless, the court concluded that the post-trial affidavits "do not constitute evidence outside the record sufficient to preclude the application of *res judicata* to this claim." (*Id.* at 3, 240 Ill.Dec. 636, 718 N.E.2d 117.) The court characterized counsel's decision not to investigate and present alibi witnesses, and instead to present no evidence in Owens's defense at all, as a "tactical choice made on the basis of strategic considerations." (*Id.* at 3, 240 Ill.Dec. 636, 718 N.E.2d 117.) Further, the court concluded that Petitioner had not alleged that he asserted his right to testify on his own behalf and that he had not established how absence of his

testimony prejudiced his defense. (*Id.* at 4, 240 Ill.Dec. 636, 718 N.E.2d 117.)

Following this appeal, Petitioner filed a Petition for Rehearing on March 31, 2011 (Ex. N to Supplemental Record), which the appellate court denied on June 22, 2011. (Ex. O to Supplemental Record.) Finally Petitioner filed a PLA with the Illinois Supreme Court. (Ex. P to Supplemental Index.) The PLA was denied on September 28, 2011. (Ex. Q to Supplemental Record.)

DISCUSSION

In his petition to this court, Owens claims that (1) the long delay in resolution of his state court postconviction petition violated his due process rights; (2) there was no probable cause to arrest him; (3) the trial court should have suppressed the photo array and lineup evidence because it was improperly suggestive; (4) the trial court made improper "extrajudicial" findings regarding Owens's motive, basing its finding of guilt on evidence not produced at trial; and (5) trial counsel provided ineffective assistance of counsel. In response, Respondent argues that an "inordinate delay" claim (Claim 1) is not cognizable on habeas review; that rejection of Owens's "extrajudicial findings" claim (Claim 4) was not an unreasonable application of, or contrary to, United States Supreme Court precedent; and that the remaining claims (Claims 2, 3, and 5) are procedurally defaulted. This court addresses the threshold issues raised in Respondent's answer-whether the claims are cognizable or procedurally defaulted-before considering the merits of those claims that are appropriately before this court.

I. Threshold Issues

A. Cognizability

Respondent is correct that the long delay in resolution of Owens's state postconviction petition does not support habeas relief. The object of habeas corpus relief "'is not to make whole someone who has suffered a loss,' but 'to determine whether a person is being confined in violation of basic norms of legality.'" *Jackson v. Duckworth,* 112 F.3d 878, 880 (7th Cir.1997) (quoting *Allen v. Duckworth,* 6 F.3d 458, 460 (7th Cir.1993)). Accordingly, "'delay in receiving a ruling on a discretionary state collateral appeal is not a ground for federal habeas corpus relief'" *Id.* (quoting *Montgomery v. Meloy,* 90 F.3d 1200, 1206 (7th Cir.1996)). Thus, habeas relief is denied on this claim (Claim 1).

B. Procedural Default

*8 Analysis of Respondent's procedural default argument is more complicated. Before seeking habeas review, a petitioner must exhaust available state remedies. 28 U.S.C. § 2254(b). Courts interpret this provision to require a petitioner to "'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Johnson v. Pollard,* 559 F.3d 746, 751 (7th Cir.2009) (alteration in original) (quoting *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995)). To fairly present his federal claim, a petitioner must put the claim through one complete round of the State's

established appellate review process. *Id.* at 752 (citing *Woodford v. Ngo*, 548 U.S. 81, 92, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006)). "Failure to do so precludes review by federal courts." *Id.*

Petitioner has not challenged Respondent's contention that Petitioner's challenge to probable cause for arrest (Claim 2) and to the identification procedures (Claim 3) were presented only to the Illinois appellate court, and were not explicitly argued in Petitioner's direct appeal PLA to the Illinois Supreme Court. Petitioner wisely does not argue that the "catch-all" language in his PLA, purporting to preserve errors not included due to space constraints, preserves these errors for habeas review. Those claims for habeas relief are procedurally defaulted.

Respondent also argues that Petitioner's ineffective assistance of counsel claims are procedurally defaulted. Respondent is correct that Petitioner did not raise these claims in his direct appeal PLA. Respondent filed his brief before the resolution of the postconviction petition, however. That petition did present his ineffective assistance claims, which Petitioner then raised in both the Illinois appellate court and the Illinois Supreme Court. Thus, the claims were subject to a full round of review.

Respondent argues that *res judicata,* under Illinois law, bars Petition from asserting these ineffective assistance claims. But the Seventh Circuit has "'repeatedly held that res judicata is not a bar to consideration of claims in a federal habeas action.'" *Davis v. Lambert,* 388 F.3d 1052, 1058 (7th Cir.2004) (quoting *Moore v. Bryant,* 295 F.3d 771, 776 n. 1 (7th Cir.2002)). In doing so, the Seventh Circuit has

concluded that a state court's determination on postconviction review that a petitioner's ineffective assistance claim is barred by *res judicata* is not an "adequate and independent state ground for rejecting the petition." *Id.* "'[F]ederal review is precluded only by procedural forfeitures, not by *res judicata* concerns." *Id.* (citing *Page v. Frank* 343 F.3d 901, 907 (7th Cir.2003)). Because Petitioner's ineffective assistance claims were fully and fairly presented through one complete round of state court review, they are not procedurally defaulted.

II. Merits Analysis

Two of the five claims survive to be decided on the merits: the claim that the court made improper "extrajudicial" findings regarding petitioner's motive and the ineffective assistance of counsel claims. Where the state courts deny a petitioner's federal claim on the merits, a federal court may grant habeas relief only where the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Smith v. McKee,* 598 F.3d 374, 382 (7th Cir.2010). The Seventh Circuit has observed that a review for reasonableness "is highly deferential; indeed, 'a state decision may stand as long as it is objectively reasonable, even if the reviewing court determines it to be substantively incorrect.'" *Morgan v. Hardy,* 662 F.3d 790, 797 (7th Cir.2011) (quoting *Barrow v. Uchtman,* 398 F.3d 597, 602 (7th Cir.2005)); *see also Harding v. Sternes,* 380 F.3d 1034,

1043 (7th Cir.2004) ("A federal habeas court must find that the state's application of federal law was unreasonable and not simply erroneous or incorrect."). To be "objectively unreasonable," a state court's decision must fall "'well outside the boundaries of permissible differences of opinion.'" *Morgan,* 662 F.3d at 797 (quoting *Watson v. Anglin,* 560 F.3d 687, 690 (7th Cir.2009)). The petitioner bears the burden to show that the state courts' application of federal law was unreasonable. *Sturgeon v. Chandler,* 552 F.3d 604, 609 (7th Cir.2009) (citing 28 U.S.C. § 2254(e)(1); *Harding,* 380 F.3d at 1043). Where, however, the state court's adjudication of the claims was not on the merits, a federal habeas court reviews the claims *de novo. Cone v. Bell,* 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009).

A. Improper Extrajudicial Findings

*9 Petitioner claims he was deprived of a fair trial when, while announcing the verdict, the trial court judge made extrajudicial findings regarding Petitioner's motive to commit the murder. On direct appeal, the appellate court concluded that the judge's comments were not based on the evidence because there was "no evidence presented that [Owens] knew Nelson was dealing drugs, and there was no evidence presented that [Owens] was involved with gangs or the illegal drug trade." (Direct Appeal Order at 25.) Nevertheless, the majority of the appellate panel determined that the trial court's speculation as to Owens's motive for assaulting Nelson constituted harmless error because the eyewitness testimony was reliable enough to sustain the conviction.

Petitioner bears the burden to show that the state courts' decision violates the Constitution. Petitioner has asserted that he was denied a fair trial because the judge's extrajudicial findings were based on his personal opinion, bias, or prejudice. (Habeas Pet. at 7.) Beyond this initial assertion, however, the Petitioner does little to advance this line of argument. In Petitioner's *pro se* reply brief, he asserts that the extrajudicial findings were "racist." (Pet'r's Pro-Se Habeas Corpus Reply Pet. [52], at 3.) Later, in a brief prepared by counsel, Petitioner does not even address the trial court's extrajudicial findings, and instead focuses on his ineffective assistance of counsel claim. Thus, Petitioner has not identified any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way. Petitioner's failure to carry his burden is, alone, enough reason to deny habeas relief on his "extrajudicial findings" claim.

Even if Plaintiff could establish that extrajudicial findings by a state court judge violated a clearly established Supreme Court precedent, the relevant inquiry is whether the appellate court's determination that the extrajudicial findings were harmless error was a reasonable application of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *See Johnson v. Acevedo,* 572 F.3d 398, 404 (7th Cir.2009) (explaining that where a state court conducted a harmless error analysis, the question for federal courts is whether it was a reasonable application of *Chapman*). Under *Chapman,* in order for a constitutional error to be considered harmless, it must be considered harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24.

The appellate court's harmless error analysis was not an unreasonable application of *Chapman*. In discussing the evidence, the Appellate Court reviewed the testimony of the two eyewitnesses in detail. The Appellate Court thought it significant that a witness within a few feet of the attack had ample opportunity to observe the assailant. Additionally, although their testimony was not entirely consistent, each of the two witnesses positively put the Petitioner at the scene. With such evidence, it is not unreasonable for the appellate court to determine the error of motive speculation as harmless beyond a reasonable doubt. As the Petitioner made no substantive argument to further his claim, and the appellate court applied Supreme Court precedent in a reasonable manner, habeas relief on Count 4 is denied.

B. Ineffective Assistance of Counsel

*10 The court turns, finally, to the ineffective assistance claims. Petitioner claims trial counsel was ineffective in (1) failing to investigate, interview, or call alibi witnesses to testify and (2) failing to put Petitioner on the stand at trial. 4 "'[T]he right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). To establish a claim under *Strickland*, Petitioner must show he received deficient assistance, and that this deficiency resulted in prejudice. *Morgan*, 662 F.3d at 802.

Deficiency is established where the attorney's performance falls below "an objective standard of reasonableness." *Id.* (citing *Strickland*, 466 U.S. at

688). Review of an attorney's performance is "highly deferential and reflects a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.... So long as an attorney articulates a strategic reason for a decision that was sound at the time it was made, the decision generally cannot support a claim of ineffective assistance of counsel." *Yu Tian Li v. United States,* 648 F.3d 524, 527-28 (7th Cir.2011).

To establish prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Morgan,* 662 F.3d at 802 (citing *Strickland,* 466 U.S. at 694). The error must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (citing *Strickland,* 466 U.S. at 687). "The likelihood of a different result must be substantial, not just conceivable." *Id.* Further, there is no need to consider the performance prong of the *Strickland* analysis if the court finds the prejudice prong cannot be satisfied. *Id.* (citing *Matheney v. Anderson,* 253 F.3d 1025, 1042 (7th Cir.2001)).

This case presents complications in determining the appropriate level of deference toward the state court's adjudication of Petitioner's ineffective assistance claims. Where a federal habeas court reviews a state court's adjudication of a petitioner's ineffective assistance claim on the merits, 28 U.S.C. § 2265(d) applies and the question is whether "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter, U.S.,* —

U.S. —, —, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). When AEDPA's "highly deferential" standard for review of a state court's application of federal law applies in tandem with *Strickland'* s "highly deferential" standard for an attorney's performance, "review is 'doubly' so." *Id.* at 788 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

*11 In this case, however, the state courts did not directly resolve the ineffective assistance argument on the merits, instead denying the postconviction petition on *res judicata* grounds. Although *res judicata* implies that the merits of the issue had already been decided, Petitioner's postconviction petition included factual assertions outside the trial record that could not have been part of his claims on direct appeal, a fact that the Illinois appellate court itself acknowledged. At no point during the state court postconviction proceedings did the state courts conduct an evidentiary hearing to evaluate the merits of Petitioner's ineffective assistance claims. This court is inclined to take the state courts at their word: denial of the ineffective assistance claims in Petitioner's postconviction petition was based on *res judicata.* Furthermore, the Illinois appellate court never addressed *Strickland's* prejudice prong with regards to Owens's postconviction petition on the grounds that Rago did not *call* alibi witnesses to testify, and did not address Rago's alleged failure to *investigate* Owens's alibi at all. In similar cases, the Supreme Court has reviewed habeas petitions *de*

novo. See, e.g ., Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (applying *de novo* review where the state courts did not address *Strickland'* s prejudice prong); *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (same). As the court explains here, the state court's application of *Strickland* in its *res judicata* analysis appears inadequate under either standard of review.

1. Failure to Investigate or Call Alibi Witnesses

On appeal from denial of his post-conviction petition, the Illinois appellate court rejected Petitioner's claim that his trial counsel was ineffective for failing to call his alibi witnesses to testify. According to that court, the new evidence submitted by Petitioner was "not sufficient to preclude the application of *res judicata"* because Petitioner had failed to demonstrate that Rago's decision to call Blackman and Minor to present an alibi defense was anything other than sound trial strategy. The court observed that Rago had been informed of the alibi testimony prior to trial, but that he concluded that the testimony was unnecessary "after assessing the perceived weaknesses in the State's case." (Postconviction Order at 3.) Thus, the court concluded that Rago's decision to present no evidence in Petitioner's defense was a "tactical choice made on the basis of strategic considerations." *(Id.)*

Based on the uncontroverted evidence presented by Petitioner, however, this court cannot divine any reasonable argument that resting without presenting any evidence in Petitioner's defense is a sound alternative to presenting evidence that, if accepted by the trier of fact, would establish an absolute defense. This is not a situation where the presentation of

certain evidence might undermine other defense evidence, or where counsel believes one defense to be stronger than or inconsistent with another. Petitioner's alibi defense was compatible with, and in fact considerably bolstered, the perceived weaknesses in the prosecution's case due to the credibility problems with the only witness for the prosecution who claimed familiarity with the assailant from before the incident—Evans. *See Malone v. Walls,* 538 F.3d 744, 761 (7th Cir.2008) ("Especially when there are vulnerabilities in the prosecution's identification testimony, '[o]pposing testimony from other eyewitnesses ... give[s] the jury a qualitatively different and more powerful reason to believe that the State's witnesses [a]re mistaken in their identifications.'" (quoting *United States ex rel. Hampton v. Leibach,* 347 F.3d 219, 250 (7th Cir.2003))). Furthermore, the evidence does not support the conclusion that Rago made a strategic decision not to call alibi witnesses; according to the uncontroverted affidavit testimony submitted by Petitioner, Rago neither investigated Petitioner's alibi nor interviewed his alibi witnesses at all. Thus, it appears that Rago's decision not to call alibi witnesses was "one that occurred by default rather than design." *Hampton,* 347 F.3d at 249.

***12** The Illinois appellate court did not address the prejudice prong with regard to trial counsel's failure to call alibi witnesses, but the court concludes that it is easily satisfied here. There was a substantial likelihood that the presentation of a persuasive alibi defense would have altered the outcome at trial in a case where the only evidence against Petitioner was testimony from two eyewitnesses, one of whom-the only one who claimed previous familiarity with the

assailant-had "severe[ ]" credibility problems. *Cf. Malone,* 538 F.3d at 761 (holding unreasonable a state appellate court's determination that a petitioner was not prejudiced when his counsel failed to call a witness who would have rebutted the testimony of the prosecution's witness); *Hampton,* 347 F.3d at 253 ("Given the central role that eyewitness testimony played in this case, the vulnerabilities of the testimony of the State's eyewitnesses, and the shortcomings in human perception that so frequently render eyewitness testimony less reliable than other types of evidence, we are more than satisfied that the failure to investigate exculpatory eyewitnesses likely affected the outcome of [the petitioner's] trial." (citation omitted)).

Failure to *call* alibi witnesses was only one aspect of petitioner's ineffective assistance argument. The Illinois appellate court did not in any fashion address Petitioner's claim that his trial counsel failed to *investigate* the alibi defense or to interview the alibi witnesses. This failure affords an independent basis for an ineffective assistance of counsel claim.

> The duty to investigate derives from counsel's basic function, which is "to make the adversarial testing process work in the particular case." "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, [the Supreme Court has] noted that counsel has a duty to make reasonable investigations or to

> make a reasonable decision that makes particular investigations unnecessary."

Hampton, 347 F.3d at 247 (alteration in original) (citations omitted) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)) (internal quotation marks omitted). If Petitioner's counsel did not investigate Petitioner's alibi, as Petitioner's unchallenged post-trial affidavits attest, Petitioner's defense was prejudiced for the same reasons described above with respect to Petitioner's failure-to-call-alibi-witnesses claim.

The court is nevertheless unwilling to assume that the affidavits Petitioner presents to substantiate his ineffective assistance claims are sufficient to support habeas relief without further investigation. One of those affidavits is from Petitioner himself, and another from his mother. Although the other affiants do not have the same obvious motive to fabricate evidence, their exculpatory assertions have never been subject to cross-examination. Additionally, the record contains no testimony from Petitioner's trial counsel either affirming or denying Petitioner's factual assertions about counsel's performance. An evidentiary hearing is necessary to give both Petitioner and the State an opportunity to develop evidence concerning his trial attorney's performance.

***13** In reaching this conclusion, the court recognizes the limitations imposed by AEDPA on a federal habeas court's authority. If, under § 2254(d), a federal court is limited to reviewing a state court's "adjudication on the merits," recent Supreme Court precedent would preclude this court from holding an evidentiary hearing. *See Cullen v. Pinholster*, — *U.S.*

—, —, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) ("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). As noted above, however, the state court here rested its determination of the ineffective assistance claim on *res judicata* grounds, and did not decide the claim on its merits. At a minimum, it is clear that state courts did not address Petitioner's failure-to-investigate claim and did not address the prejudice prong for Petitioner's failure-to-call-alibi-witnesses claim, and therefore did not adjudicate those claims on the merits.

Even outside of § 2254(d), AEDPA generally bars federal courts from holding evidentiary hearings to supplement the record. 28 U.S.C. § 2254(e)(2). Where, however, "the ' fail[ure] to develop the factual basis of a claim in State court proceedings' can not be attributed to something the petitioner 'did or omitted,' Section 2254(e)(2) does not apply and it is then necessary to evaluate the request for an evidentiary hearing under pre-AEDPA standards." *Matheney*, 253 F.3d at 1039 (alteration in original). "Under pre-AEDPA standards, a federal evidentiary hearing is required if (1) a habeas petitioner alleges facts which, if proved, would entitle him to relief and (2) the state courts—for reasons beyond the control of the petitioner—never considered the claim in a full and fair hearing." *Id.* (citing *Porter v. Gramley*, 112 F.3d 1308, 1317 (7th Cir.1997)).

The court is satisfied that Petitioner meets these requirements. Trial counsel's failure to interview or call alibi witnesses did not appear on the face of the trial court record, and direct appeal was limited to review of that record—a principle that Petitioner's

appellate counsel mentioned in the brief on direct appeal. Petitioner's requests for a evidentiary hearing on state postconviction review were denied even though Petitioner diligently came forward with affidavit testimony that, if true, would establish that trial counsel failed to provide effective assistance. Because the facts concerning his attorney's performance are undeveloped, the state courts never had the opportunity to consider Petitioner's ineffective assistance of counsel claims in a "full and fair hearing." Under circumstances similar to these, the Seventh Circuit vacated a district court's order denying habeas relief and remanded for an evidentiary hearing. *See, e.g., Davis,* 388 F.3d at 1058-67 (concluding that a petitioner was entitled to an evidentiary hearing where the Illinois appellate court dismissed the petitioner's *Strickland* claim on *res judicata* grounds without conducting an evidentiary hearing). The court concludes Petitioner is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to investigate Petitioner's alibi and for failing to call alibi witnesses.

2. Petitioner's Right to Testify

*14 On postconviction appeal, the Illinois appellate court also rejected Petitioner's ineffective assistance claim predicated on his trial counsel's refusal to let Petitioner testify on his own behalf. The court cited *People v. Barkes,* 399 Ill.App.3d 980, 989, 340 Ill.Dec. 383, 928 N.E.2d 102, 112 (2d Dist.2010), for the proposition that Petitioner was required to assert his right at trial, which Petitioner did not do. Under Illinois law, a criminal defendant's "conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously

asserted his right to testify by informing the trial court that he wished to do so." *People v. Smith,* 176 Ill.2d 217, 234, 223 Ill.Dec. 558, 680 N.E.2d 291, 302 (1997); *see also Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir.2006) (recognizing Illinois as among the jurisdictions that require "a defendant to protest a lawyer's refusal to allow her to testify during trial to preserve the right"). The court also noted that Petitioner's affidavit did not indicate "how or when defendant informed counsel of his alleged desire to testify." (Postconviction Order at 4.) Additionally, the Illinois appellate court concluded that Petitioner had failed to explain how the absence of his testimony prejudiced his defense.

Under clearly establish Supreme Court precedent, "[a] criminal defendant's right to testify is 'a fundamental constitutional right.'" *Thompson,* 458 F.3d at 619 (quoting *Rock v. Arkansas,* 483 U.S. 44, 53 n. 10, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). Although a criminal defendant may waive that right, Petitioner contends that his trial counsel forbade him from testifying, and that neither his trial counsel nor the judge explained that the decision to testify was his alone. In his sworn affidavits, Petitioner asserts that had he been allowed to testify, he would have asserted his "actual innocence" and explained that he had an alibi defense.[5] Had he so testified, there is at least a reasonable probability that his alibi defense would have altered the outcome at trial; as noted above, the eyewitness testimony that provided the sole evidence against Petitioner was not overwhelming. In the absence of testimony from alibi witnesses, Petitioner's testimony on his own behalf would have been the only opportunity the court had to hear Petitioner's alibi defense. This court concludes that the Illinois

appellate court's conclusion that Petitioner did not explain how absence of his testimony prejudiced him appears to be an unreasonable determination of the facts and an unreasonable application of *Strickland*.

Further, Petitioner appears to have adequately pleaded facts sufficient to justify an evidentiary hearing on an ineffective assistance claim predicated on the denial of his right to testify. The Seventh Circuit has "steer[ed] a middle course" between courts, such those in Illinois, which require a criminal defendant to protest at trial counsel's refusal to allow the defendant to testify, and those jurisdictions that "require judges to inquire of defendants directly whether they want to testify." *Thompson*, 458 F.3d at 619. The Seventh Circuit requires "a defendant who wishes to raise this claim to meet a heightened pleading standard before the court must hold an evidentiary hearing on the question of waiver." *Id.* Under this heightened pleading standard, "a `barebones assertion by a defendant, albeit made under oath, is insufficient'; something more, such as an affidavit from the lawyer who allegedly forbade his client to testify, is required." *Id.* (quoting *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991)). Petitioner does not present an affidavit from his trial counsel, but he does provide more than just his own sworn affidavit to substantiate his claim. Although the court notes the affiant's obvious conflict of interests, Petitioner presents sworn testimony from his mother, who appears to have participated in Petitioner's defense preparation. Ms. Owens testifies that she informed Petitioner's trial counsel several times that her son wanted to testify, but that at trial, counsel declined to present any evidence or to call his client to

the stand. Petitioner's claim is bolstered by Minor's and Blackman's affidavits, which suggest that counsel's performance was deficient in other respects. Even if Petitioner's evidence supporting his right-to-testify claim were not sufficient on its own to merit an evidentiary hearing, this claim obviously overlaps with the failure to-call-alibi-witnesses and failure-to-investigate claims. The court will conduct a single evidentiary hearing on all of Petitioner's ineffective assistance claims.

CONCLUSION

*15 For the reasons state above, the court will convene an evidentiary hearing of limited scope to determine (a) whether trial counsel failed to investigate Petitioner's alibi defense, interview his alibi witnesses, or call his alibi witnesses to testify; and (b) whether, and to what extent, Petitioner understood his right to testify. All other claims are denied. With resolution of a constitutional issue pending an evidentiary hearing, the court declines to issue a certificate of appealability at this time. Status conference is set for Thursday, May 10, 2012, at 9:30 a.m. for purposes of scheduling.

Footnotes

1. Owens has also asserted that Rago did not prepare Owens to testify before calling him as a witness at the hearing on his motion to quash the arrest. (Jan. 11, 2008 Owens Aff. ¶ 3, Ex. F to Pet'r's Reply.) Owens does not, however, advance this argument in his federal habeas petition.

2. No copy of this *pro se* petition appears in the record, but Respondent does not dispute that it was filed.

3. Petitioner's counsel later filed an amended supplemental petition in which Petitioner claimed, pursuant to the Illinois Post—Conviction Hearing Act, 725 ILCS 5/122-1(a)(1), and the due process clause of the Illinois Constitution, *see People v. Washington*, 171 I11.2d 475, 489, 216 Ill.Dec. 773, 665 N.E.2d 1330, 1337 (1996), that he was actual innocent based on newly discovered evidence. (Am. Supplemental Pet for Post—Conviction Relief, Ex. H to Resp't's Answer, at 1.) The trial court ultimately dismissed Owens's petition on this ground. (Brief and Argument for Petition—Appellant in *People v. Owens*, No. 1-09-2626 (hereinafter "Peres Postconviction Appeal Brief"), Ex. J to Supplemental Index of State Court Record Exhibits (hereinafter "Supplemental Record"), at 12.) It is not clear from the record on what grounds the trial court rejected Petitioner's actual innocence claim, but the court notes that the affidavits from Blackman and Minor do not constitute "newly discovered evidence" because the facts to which they attest were available to Petitioner at the time of his trial. Petitioner did not challenge the trial court's determination of his actual innocence claim on appeal.

4. Petitioner does not raise his trial counsel's failure to object to the photo array and lineup identifications as additional grounds for an ineffective assistance argument.

5. Petitioner's proposed testimony is distinguishable from the proposed testimony described in *Barkes*, the case cited by the Illinois appellate court in support of its conclusion on prejudice. In *Barkes*, a criminal defendant convicted of criminal sexual assault and aggravated criminal sexual abuse failed to establish prejudice where the "defendant did not indicate that had he been called to testify he

would have stated that he did not have sexual intercourse with [the victim] or that he was not in a position of trust, authority, or supervision over her, the central issues in the case." *Barkes*, 399 Ill.App.3d at 990, 980 N.E.2d at 113. Similarly, *Barkes* relied on a case in which the court found no prejudice where the defendant, accused of biting a police officer, "did not indicate that, if he had been called to testify, he would have stated that he had no altercation with the officer, that the officer's finger was injured before the altercation began, or that he did not bite the officer." *People v. Youngblood*, 389 Ill.App.3d 209, 218, 329 Ill.Dec. 522, 906 N.E.2d 720, 728 (2009) (2d Dist.2009). In this case, in contrast, Petitioner alleges that he would have testified that he was not even in the same city as Nelson at the time Nelson was murdered.

People v. Owens, 955 N.E.2d 477 (Table) (2011)
353 Ill.Dec. 10
955 N.E.2d 477 (Table)

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Lawrence Owens

NO. 112668 |
SEPTEMBER TERM, 2011 | September 28, 2011

Lower Court: No. 1–09–2626

Opinion
Disposition: Denied.

Parallel Citations
955 N.E.2d 477 (Table)

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-09-2626

FIRST DIVISON
March 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	
v.	)	No. 99 CR 25287
LAWRENCE OWENS,	)	
Petitioner-Appellant.	)	Honorable Luciano Panici, Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court. Justices Hoffman and Rochford concurred in the judgment.

SUMMARY ORDER

Defendant Lawrence Owens appeals from the second-stage dismissal of his amended petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)). Defendant contends the trial court erred in dismissing his petition without an evidentiary hearing where he made a substantial showing of ineffective assistance of trial counsel. Defendant claims trial counsel rendered ineffective assistance by failing to investigate or call two alibi witnesses to testify at trial and by depriving him of his constitutional right to testify on his own behalf.

The State counters that the trial court properly determined that the doctrine of *res judicata* precluded defendant from raising and relitigating these claims in his petition and therefore we should affirm dismissal of the petition. We agree with the State.

The doctrine of *res judicata* bars consideration of issues that were raised and decided on direct appeal. *People v. Harris*, 206 Ill. 2d 293, 299, 794 N.E.2d 181 (2002) ("any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been raised on direct appeal are deemed waived"). The claims raised by defendant in his petition are the same ones raised and decided in his direct appeal.

Defendant attempts to avoid the bar of *res judicata* by presenting evidence outside the record. *Res judicata* does not bar a defendant from raising an ineffective assistance claim in a petition for postconviction relief if the claim is based on evidence outside the record. *People v. Ward*, 187 Ill. 2d 249, 257, 718 N.E.2d 117 (1999).

In regard to his ineffective assistance claim premised on trial counsel's alleged failure to investigate or call alibi witnesses, defendant attempts to avoid application of *res judicata* to this claim by presenting evidence outside the record in the form of affidavits by Timothy Blackman and Sheila Minor asserting that defendant was with them on the night of the offense. The affidavits of Blackman and Minor do not constitute evidence outside the record sufficient to preclude the application of *res judicata* to this claim.

Decisions concerning what witnesses to call are generally viewed as matters of trial strategy immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40, 794 N.E.2d 155 (2002). In the instant case, defendant has failed to overcome the presumption that counsel's decision not to call Blackman and Minor was anything other than a tactical choice made on the basis of strategic considerations.

The affidavits of defendant and his mother, Bertha Marie Owens, indicate that trial counsel had been informed of the witnesses' alibi testimony prior to trial. The fact that counsel was aware of these witnesses' testimony before he made the decision not to call them, lends support to the inference that the decision was a matter of trial strategy rather than deficient performance. *See People v. Whittaker*, 199 Ill. App. 3d 621, 629, 557 N.E.2d 468 (1990).

Moreover, in her affidavit, Mrs. Owens attested that trial counsel told her that he planned to present an alibi defense but, after assessing the perceived weaknesses in the State's case, he "decided" otherwise when the State rested its case-in-chief. "Mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." *People v. Stewart*, 104 Ill. 2d 463, 492, 473 N.E.2d 1227 (1984).

Finally, in regard to his ineffective assistance claim premised on trial counsel's alleged conduct in depriving him of his constitutional right to testify on his own behalf, defendant attempts to avoid application of *res judicata* to this claim by presenting evidence outside the record in the form of his own affidavit. Defendant avers that trial counsel "forbid" him from testifying on his own behalf and failed to explain to him his right to testify.

A defendant making a postconviction claim that trial counsel was ineffective for refusing to allow him to testify must allege that he asserted his right to testify. *People v. Barkes*, 399 Ill. App. 3d 980, 989, 928 N.E.2d 102 (2010). In addition, the defendant must show how the absence of his testimony prejudiced his defense. *Barkes*, 399 Ill. App. 3d at 989.

In this case, defendant's petition and affidavit contain no allegations that he made an assertion of his right to testify. In addition, there is no indication as to how or when defendant informed counsel of his alleged desire to testify. And finally, defendant fails to show how the absence of his testimony prejudiced his defense.

Accordingly, we find that the trial court properly dismissed defendant's amended petition for postconviction relief. This order is entered pursuant to Supreme Court Rule 23(c)(2), (4) (eff. Jan. 1, 2011).

Affirmed.

People v. Owens, 203111.2d 563 (2003)
788 N.E.2d 733 (Table)

273 Ill.Dec. 142
203 Ill.2d 563

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Lawrence Owens

NO. 95534 | MARCH TERM, 2003 | April 02, 2003

Lower Court: No. 1-01-0341

Opinion
Disposition: Denied

Parallel Citations
203 I11.2d 563, 788 N.E.2d 733 (Table)

Third Division
December 4, 2002

No. 1-01-0341

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 99 CR 25287
LAWRENCE OWENS,	)	
Defendant-Appellant.	)	Honorable Joseph Macellaio, Judge Presiding.

ORDER

On November 8, 2000, following a bench trial, defendant Lawrence Owens, was found guilty of first-degree murder for beating Ramon Nelson to death with a baseball bat outside a lounge and liquor store in Markham, Illinois. On January 12, 2001, defendant was subsequently sentenced to 25 years' imprisonment in the Illinois Department of Corrections.

On appeal, defendant contends that: (1) the trial court erred in denying his motion to quash arrest; (2) the lineup evidence should have been suppressed as the fruits of an illegal arrest; (3) the trial court erred in failing to suppress the identification evidence on the ground that the photo-array and lineup were unnecessarily suggestive; (4) the trial court's extrajudicial findings regarding his alleged motive to commit the charged crime, indicate that he was denied a fair trial; (5) he was denied effective assistance of counsel; and (6) his 25-year sentence for first-degree murder was excessive. For the reasons that follow, we affirm.

Evidence was presented that on the evening of September 22, 1999, at approximately 8:30 p.m., outside the' entrance of a lounge and liquor store, defendant walked up to Nelson and beat him about the head with a baseball bat. Nelson died of the injuries he sustained in the beating.

In a hearing conducted on April 10, 2000, prior to defendant's bench trial, defendant unsuccessfully moved to quash his warrantless arrest on the ground of lack of probable cause. The following relevant facts were presented at the hearing.

Defendant testified that on October 26, 1999, he was driving down a street in Markham, Illinois, when he was arrested on a traffic violation. Defendant testified that the arresting police officer never indicated that he had a warrant for defendant's arrest. Defendant testified that after he was arrested, he was placed in a lineup; however, he was not fingerprinted, photographed or processed. Defendant testified that he has been held in custody ever since

his arrest on the traffic stop. He testified that the police officers who arrested him on the traffic stop never questioned him about Nelson's murder.

On cross-examination, defendant conceded that when he was arrested, he was driving a blue Topaz automobile, but he denied that he drove 50 miles an hour in a 20 mile an hour zone, and he denied that he sped through a stop sign without stopping. Defendant testified that as he was driving down the street, he did not see a squad car with its emergency lights activated until about 30 seconds before he stopped his car. Defendant then knew the police were trying to pull him over. Defendant testified that after he pulled his car over and exited the car, he walked away, but did not run. Defendant testified that he walked from Sussex through a passageway and over to the next block on Nottingham. Defendant was arrested after he informed police that he did not have a driver's licence. On redirect-examination, defendant testified that police officers never informed him that he was under arrest for murder.

Detective Terry White testified that he was assigned to the Nelson assault investigation on September 22, 1999. The detective testified that on September 28, 1999, six days after Nelson's assault and murder, he spoke with Maurice Johnnie and William Evans who both stated that they witnessed Nelson's beating. Johnnie described Nelson's attacker as a large black male, approximately 6'2" to 6'4", weighing about 220 to 240 pounds, dressed in brown. Evans described Nelson's attacker as a large black male, dressed in brown or tan. Detective White testified that Johnnie and Evans subsequently identified defendant in a photo-array as the individual

who attacked Nelson on the evening of September 22, 1999. The detective testified that based upon Johnnie and Evans' photo-array identifications, he informed his fellow officers to be on the look-out for defendant because defendant was wanted in connection with a murder investigation. On cross-examination, detective White acknowledged that no warrant was ever issued for defendant's arrest.

Arresting Officer Mike Alexander testified that on September 29, 1999, at roll call, detective White informed him that the defendant, also known as "Big O," was wanted in connection with a murder investigation. Officer Alexander testified that on the evening of October 26, 1999, at approximately 9:00 p.m., he arrested defendant for a traffic violation; specifically speeding and driving without a driver's license. The officer testified that he was in an unmarked squad car, when he saw a blue Mercury Topaz speed by, traveling 50 miles an hour in a 20 mile an hour zone. Officer Alexander testified that he activated his emergency lights and sirens, but the Topaz did not stop. Instead, the Topaz sped up and accelerated through a stop sign. The Topaz proceeded northbound on Kedzie and then eastbound on Sussex, where it eventually pulled over and stopped. Officer Alexander testified that defendant then exited the Topaz and ran northbound through a crosswalk. The officer testified that he exited his vehicle and gave chase on foot and eventually caught defendant when they both ran out of wind. The foot chase covered approximately a block and a half. Officer Alexander testified that he arrested defendant and transported him to the Markham police station when defendant could not produce a driver's license. Officer Alexander testified that when he and defendant reached the

police station, he notified detective White that defendant was in custody.

After both sides rested, defendant argued that if two credible eyewitnesses allegedly identified him as Nelson's attacker from a photo-array, then there should have been an arrest warrant issued so that a judge could have determined whether there was probable cause to arrest him. Defendant argued that there were no exigent circumstances excusing the obtaining of an arrest warrant.

The State responded that police officers had probable cause to arrest defendant on October 26, 1999, based on defendant's speeding through a residential neighborhood, driving through a stop sign without stopping and driving without a driver's license. In addition, the State claimed that police officers had probable cause to arrest defendant for Nelson's murder based on the photo-array identifications. After hearing arguments, the trial court denied defendant's motion to quash arrest, ruling that defendant's constitutional rights were not violated during the traffic arrest or at the Markham police station.

At trial, Johnnie testified[1] that on the evening of September 22, 1999, sometime after 8:00 p.m., he was seated in the front passenger seat of his own car, which was parked near the entrance doors to Mackie's lounge and liquor store located on 159th and Dixie Highway, in Markham, Illinois. Johnnie testified that his friend, Johnny Morgan was seated in the driver's

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[1] On October 29, 1999, Johnnie and Evans both testified before the grand jury regarding this matter.

seat and that a third individual was seated in the back seat. Johnnie testified that the third individual was Johnny Morgan's friend. Johnnie testified that his car was parked facing the lounge's front doors, approximately 10 feet away from the doors. The sun had gone down, but it was not dark yet, and the area in front of the lounge was illuminated by street lights and lights near the lounge's front doors.

The third individual exited the car and went into the liquor store. Johnnie testified that he and Johnny Morgan remained in his parked vehicle and waited for the third individual to return. Johnnie testified that as he and Johnny Morgan were sitting in his car talking, Nelson, who was on a bicycle, pulled up alongside the vehicle's driver side door and began speaking with Johnny Morgan. Johnnie testified that he did not know Nelson. Nelson spoke to Johnny Morgan for about three to five minutes and then rode his bike past the front of the car, onto the sidewalk and proceeded down the sidewalk to the right of Johnnie.

Johnnie testified that Nelson proceeded down the sidewalk on his bicycle and was about eight feet from the entrance of the lounge, when he attempted to turn around. Johnnie testified that he saw a man walking down the sidewalk approaching from his far right and toward Nelson as Nelson was attempting to turn his bicycle around. As Nelson was attempting to turn around, the man caught up with Nelson and started striking him on the head with a wooden stick or baseball bat type object. Johnnie testified that he saw Nelson get hit twice. After the first blow, Nelson, who was still on his bike, fell backwards into the doorway of the liquor store. And, as Nelson lay on the

ground, the man forcefully hit him a second time around the head area, with both hands on the bat. After the man hit Nelson a second time, he turned around and went back in the direction he came from.

Johnnie testified that he and Johnny Morgan then exited his vehicle and went over to look at Nelson. Nelson's head was swollen and he was unconscious and groaning. Johnnie testified that people began to gather around and suggested that he and Johnny Morgan take Nelson to the hospital. Johnnie agreed to take Nelson to the hospital after Johnny Morgan insisted that they do so.

Johnnie testified that about a week later, on September 28, 1999, at the police department's request, he went to the Markham police station where detective White showed him a photo-array. Johnnie testified that he identified defendant as the man who attacked Nelson on September 22, 1999. He also testified that about a month later, on October 27, 1999, he went to the Markham police station where he picked defendant out of a lineup, as the man who attacked Nelson on September 22, 1999.

On cross-examination, Johnnie acknowledged that on the night of the incident he did not speak to the police even though there was an officer present in the lounge when he and Johnny Morgan returned to the lounge from the hospital. Johnnie conceded that he did not talk to the police about the incident until September 28, 1999, when the police department requested that he come to the Markham police station. Johnnie testified that at the police station, he described Nelson's attacker as a male black, approximately 240 pounds and about 6'2." When

asked if that description could be characterized as "big and bulky," Johnnie replied that he would characterize it as "medium." When asked to look at the photograph of the lineup, Johnnie agreed with defense counsel that of the five individuals in the lineup, defendant was the "biggest and the bulkiest." In addition, Johnnie agreed that he did not pick defendant out of the lineup based upon height, because everyone in the lineup was seated.

On further cross-examination, Johnnie testified that just before Nelson came over to his car to speak with Johnny Morgan, Nelson had been standing with a crowd of about four or five individuals near the lounge. Nelson and Johnny Morgan spoke to each other for about three to five minutes. Johnnie testified that Nelson seemed to admire Johnny Morgan and complimented Morgan on driving the car.

Johnnie testified that on the evening of the incident, the lighting was good because the street lights were on and the area in front of the lounge was illuminated by lights coming from the lounge itself. Johnnie testified that the man who attacked Nelson, approached from the right and that the assailant's face was facing toward him during this approach. On redirect-examination, Johnnie testified that he got his best look at defendant after defendant had just finished striking Nelson and had turned to walk away.

The parties then stipulated that State's witness officer Alexander would testify consistent with his testimony heard on April 10, 2000, at the hearing on defendant's motion to quash arrest.

Detective White testified that on September 28, 1999, he interviewed Johnnie regarding the Nelson homicide. The detective testified that after he obtained Johnnie's description of the individual who assaulted and killed Nelson, he compiled a photo-array of six men based upon this description. Johnnie subsequently picked defendant's photo out of the photo-array and identified defendant as Nelson's assailant. Detective White testified that he never indicated to Johnnie that defendant's photo was in the photo-array and he never made any suggestive remarks regarding the photo-array.

The State then proffered the photo-array and asked detective White to identify the photo that Johnnie selected on September 28, 1999. Defendant objected to detective White testifying as to Johnnie's out-of-court identification of defendant from the photo-array, arguing that Johnnie had already testified and that the photo-array was not tendered to Johnnie when he testified regarding his identification of defendant in the photo-array. After hearing arguments on the matter, outside of detective White's presence, the trial court overruled defendant's objection. When detective White returned to the witness stand, he testified that Johnnie selected defendant's photo from the photo-array, as the photo of the individual who attacked Nelson.

Detective White testified that when he learned that defendant had been arrested on October 26, 1999, he immediately contacted Johnnie and Evans so that they could come down to the police station and view a five-man physical lineup. On October 27, 1999, Johnnie and Evans independently selected defendant out of the lineup. On cross-examination, detective

White acknowledged that defendant was the only individual who was in both the photo-array and physical lineup.

The next State's witness to testify was Evans. He testified that he was currently incarcerated in the Cook County Department of Corrections on a charge of possession of a controlled substance with intent to deliver. In addition, he testified that he was currently on probation regarding a charge of delivery of a controlled substance. Evans conceded that in exchange for his truthful testimony, the State agreed to recommend a sentence of probation on the charge of possession of a controlled substance with the intent to deliver and to recommend a recommitment of probation on the charge of delivery of a controlled substance.

Evans testified that on the evening of September 22, 1999, at approximately 8:00 p.m., he was on the northeast corner of the block on which Mackie's lounge is located, when he first saw Nelson, also known as Kermit. Evans knew Nelson from the neighborhood. Evans testified that it was just a little after dark, but it was not totally dark yet. In addition, the street lights were on and there were lights coming from the liquor store. Evans testified that he was able to see people's faces. Nelson was riding around the area on a small twenty-inch bicycle. Evans testified that he spoke with Nelson for about half an hour and then Nelson rode off toward the lounge's front entrance, where he stopped and sat on his bike near the lounge's front doors.

Evans testified that he saw two guys walk up to Nelson and engage him in a conversation. One of the

guys was defendant and he was carrying a baseball bat in his hand. Evans testified that he did not know defendant, but he recognized defendants' face since defendant had previously been in the liquor store. Evans testified that at this time, he was near a garbage can on the northeast corner of the block near Mackie's lounge and liquor store, getting ready to retrieve his bucket to wash a car, when he heard something that sounded like wood splitting. Evans testified that when he looked back, he saw defendant hitting Nelson with a baseball bat. Defendant hit Nelson twice on the head. Evans testified that he could not see how many hands defendant had on the bat when he struck Nelson, because defendant's back was turned toward him. Nelson was laying near the entrance to the liquor store and he was still on his bike. Evans testified that he hollered, "hey, what is going on," whereupon defendant and the second individual both ran north, past him.

The prosecutor then showed Evans the photo-array that Evans had viewed on September 28, 1999 at the police station, and asked him if he recognized it. When Evans replied in the affirmative, the prosecutor asked him to look at the photo array and pick out the number of the photo he selected at the police station. Evans twice picked number two. Defendant's photo is actually number four. Evans then testified that on October 27, 1999, he viewed a lineup. The prosecutor showed Evans a photograph of the lineup and asked him if he recognized it. When Evans replied in the affirmative, the prosecutor asked him to look at the photograph and pick out the number of the individual he selected at the police station. Evans picked number one. Defendant was number one in the lineup.

Evans testified that right after Nelson was beaten, he went over to see him. Nelson was laying in the middle of the door shaking and he could not talk. Evans help put Nelson into a car. Evans testified that the men in the car told him not to go anywhere and that they would be right back. When Evans was shown a photograph of the lounge and liquor store and asked if the photograph fairly depicted the way the lounge and liquor store looked on the night of the incident, Evans replied that it "was not that bright."

On cross-examination, Evans denied that he was involved with a gang. He also denied that Nelson was one of his associates, testifying that he knew Nelson only from around the neighborhood. Evans testified that he never saw a car parked in front of Mackie's lounge and liquor store and claimed that he did not see a car until he and other individuals were putting Nelson into the car. Evans testified that he first saw Nelson at the northern end of Mackie's, not the southern end. Evans also testified that the two individuals that confronted Nelson, approached from the north walking southbound. Evans testified that immediately after the incident, he briefly spoke with the police and told them what he had seen. He gave police the approximate heights of the two individuals that confronted Nelson and he informed the officers that he recognized one of the individuals from around the neighborhood. Evans testified that he did not give police a full physical description of the two individuals, because the police did not ask him for one. Evans acknowledged that in return for his truthful testimony, the State had agreed to recommend that his charge of possession with intent to deliver be reduced to simple possession and

recommend that he be readmitted to probation on his earlier charge of delivery of a controlled substance.

On redirect-examination, Evans acknowledged that before he was arrested for his second drug case for which he was presently incarcerated, he had already given grand jury testimony regarding Nelson's murder. Evans acknowledged that when he testified before the grand jury, he testified that on the evening of the incident, Nelson left him at the north corner and went to talk to some guys in a car. Evans testified that he told grand jurors that he barely saw Nelson because he going to get his bucket to go wash a car. He also testified that he told grand jurors that after he heard the sound of wood cracking and saw defendant hit Nelson with a bat, defendant and a second individual ran past him, running north down Dixie highway.

The parties then stipulated that if Dr. J. Lawrence Cogan, of the Cook County Medical Examiner's Office was called to testify, he would testify that Nelson died of head injuries he sustained in an assault and that the manner of death was homicide. The parties also stipulated that officer Lee Dean would testify that on September 22, 1999, at Ingalls Hospital, he recovered a clear plastic bag from the coat worn by Nelson, and that he recovered a plastic bag which contained forty smaller plastic bags each containing a white rocky substance, which tested positive for cocaine.

The parties further stipulated that on October 18, 2000, Evans and his attorney met with the assistant state's attorney for an interview regarding the trial testimony that Evans would be giving in this

case and to discuss a deal regarding his pending drug case before such interview would take place. The parties also stipulated that State's exhibit No. 14 was a true and correct copy of Evans' grand jury testimony; a transcript of this testimony was admitted into evidence. The State then rested. Upon denial of defendant's oral motion for a directed finding, defendant then rested without presenting evidence. After hearing closing arguments on the matter, the trial court stated:

> "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [defendant] knew he was a drug dealer. [Defendant] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder."

Defendant was subsequently sentenced to 25 years' imprisonment in the Illinois Department of Corrections. He timely appealed.

ANALYSIS

Defendant concedes that the police had probable cause to arrest him on the traffic charges, but contends that the police lacked probable cause to arrest him on the homicide charge and thus argues that the trial court erred in denying his motion to quash arrest. A police officer must have probable cause to effect a valid warrantless arrest. *People v. Pearson,* 331 Ill. App. 3d 312, 316, 770 N.E.2d 1183 (2002). Probable cause to arrest exists when circumstances within the arresting officer's

knowledge are sufficient to warrant a man of reasonable caution to believe an offense has been committed and that it was committed by the individual arrested. *People v. Hoover,* 250 Ill. App. 3d 338, 620 N.E.2d 1152 (1993). Whether there is probable cause to justify an arrest depends upon the totality of the circumstances known to the officer at the time of the arrest, including the officer's factual knowledge and his or her prior law enforcement experience. *People v. Bell,* 96 Ill. App. 3d 857, 421 N.E.2d 1351 (1981); *People v. Earley,* 212 Ill. App. 3d 457, 570 N.E.2d 1235 (1991). Probable cause to arrest does not require the same degree of proof necessary to convict, but it requires more than a hunch or mere suspicion. *Bell,* 96 Ill. App. 3d at 869. The benchmark in a fourth amendment analysis is the reasonableness of the particular governmental intrusion, which depends on balancing the public interest in crime prevention against the individual's right to personal security free from arbitrary interference by police officers. *People v. Gonzalez,* 184 Ill. 2d 402, 704 N.E.2d 375 (1998).

Whether probable cause exists is usually a mixed question of law and fact, and a trial court's ruling will not be reversed unless it is manifestly erroneous. *In re D.G.,* 144 Ill. 2d 404, 581 N.E.2d 648 (1991). However, where, as here, neither the facts nor the credibility of the witnesses is contested, the determination of whether probable cause exists is a question of law subject to *de novo* review. *In re D.G.,* 144 Ill. 2d at 408-09.

In the present case, we find that under the totality of the circumstances, the police had probable cause to arrest defendant for Nelson's homicide and

therefore, the trial court did not err in denying defendant's motion to quash arrest. The record shows that on September 28, 1999, six days after Nelson was assaulted, Johnnie and Evans went to the Markham police station where they both independently viewed a photo-array and picked out defendant's photograph as the individual who assaulted Nelson. On September 29, 1999, at roll call, arresting officer Alexander received information from detective White that defendant was wanted for investigation in connection with a homicide. Approximately a month later, on October 26, 1999, Officer Alexander arrested defendant for speeding through a residential neighborhood, driving through a stop sign without stopping and driving without a driver's license. Defendant was then transported to the police station where, that same day, he was placed under arrest for Nelson's murder.

The record shows that defendant's initial warrantless arrest for the traffic violations was clearly based on probable cause. In addition, based on Johnnie and Evans' photo-array identifications, the police had probable cause to arrest and detain defendant for Nelson's homicide. See *People v. Pendleton,*104 Ill. App. 3d 1104, 1106-07, 433 N.E.2d 1076 (1982) (concluding that police had probable cause to hold defendant on a rape charge, where defendant, who was initially arrested on a traffic violation, was placed in a lineup and identified by the victim as the man who raped her). Therefore, we hold that the trial court's finding that the police had probable cause to arrest defendant for Nelson's homicide, was not manifestly erroneous and thus, the trial court did not err in denying defendant's motion to quash arrest.

Defendant next maintains that the lineup evidence should have been suppressed as the fruits of an illegal arrest. We must reject defendant's contention on this issue. Since there was probable cause for the initial warrantless traffic arrest, and probable cause for the arrest on the murder charge based on the photo-array identifications, the lineup identification which followed was not the fruit of an illegal arrest. *Pendleton*, 104 Ill. App. 3d at 1107-08.

Defendant next contends that the trial court erred in denying his motion to suppress the identification evidence because the photo-array and physical lineup were unnecessarily suggestive. The State responds that the trial court could not have erred in denying defendant's motion to suppress, because defendant never filed such a motion. The State also contends that defendant waived review of the propriety of the identification evidence introduced at trial, by failing to raise this issue in a trial objection and in a written post-trial motion.

Defendant has waived his right to argue that the photo-array and lineup procedures were suggestive. A defendant who does not move to suppress an identification waives the right to argue that the identification was the result of suggestive procedures. *People v. Pierce*, 52 Ill. 2d 7, 10, 284 N.E.2d 279 (1972); *People v. Campbell*, 115 Ill. App. 3d 631, 634, 450 N.E.2d 1318 (1983). Waiver aside, defendant's contentions on this issue must still fail.

Evidence of a witness' pretrial identifications of an accused must be excluded at trial, only where both the procedure was unnecessarily suggestive and there was a substantial likelihood of misidentification.

People v. Sykes, 161 Ill. App. 3d 623, 633, 515 N.E.2d 253 (1987); *People v. Hartzol*, 222 I11. App. 3d 631, 642, 584 N.E.2d 291 (1991). A defendant bears the burden of establishing that the pretrial procedures were unduly suggestive, and a court looks at the totality of the surrounding circumstances in making its determination on this issue. *Sykes*, 161 Ill. App. 3d at 633.

In the present case, defendant failed to meet his burden of establishing that the photo-array and lineup procedures were unnecessarily suggestive or that there was a substantial likelihood of misidentification. In regards to the photo-array, defendant asserts that the witnesses might well have selected his photograph out of the photo-array, because his photograph was proportionately much larger than the other photos and it appeared to be underexposed. Defendant's argument must be rejected because it has been determined that a photo-array is not impermissibly suggestive merely because a defendant's photograph is of a different format or a different size from the other photographs in the photo-array. See *People* v. *Collins*, 176 Ill. App. 3d 169, 175, 530 N.E.2d 1143 (1988).

In regards to the physical lineup, defendant contends that the lineup was problematical because he did not have counsel to observe the lineup proceedings, he was the largest male in the lineup, and he was the only individual who appeared in both the photo-array and physical lineup. All of defendant's contentions must be rejected.

First, it is well settled that a person's Sixth and Fourteenth amendment right to counsel attaches only

at or after the time adversary judicial proceedings have been initiated against him. See *People v. Garrett,* 179 111. 2d 239, 247, 688 N.E.2d 614 (1994). Such adversary proceedings may be initiated by way of a formal charge, preliminary hearing, indictment, information or arraignment. *Kirby v. Illinois,* 406 U.S. 682, 68889, 92 S. Ct. 1877, 1881-82, 32 L. Ed. 2d 411 (1972); *People v. Earl,* 78 Ill. App. 3d 188, 192, 397 N.E.2d 97 (1979). In the present case, the grand jury did not return its indictment against defendant until November 5, 1999, nine days after the lineup took place, therefore, defendant had no right to counsel during the lineup proceedings. Garrett, 179 Ill. 2d at 251.

Second, the physical lineup procedure was not unnecessarily suggestive merely because defendant was among the largest individuals in the lineup. Physical differences in size between an accused and other participants in a lineup does not make that lineup unduly suggestive, provided the differences are not too great. *People v. Harrison,* 57 Ill. App. 3d 9, 13, 372 N.E.2d 915 (1978). An examination of the photographic lineup in this case reveals that there is not a substantial disparity in physical size between defendant and the other participants in the lineup. Differences in the age, size, and appearance of a defendant and other participants in a lineup generally go to the weight of the evidence and not its admissibility. *People v. Maloney,* 201 Ill. App. 3d 599, 607, 558 N.E.2d 1277 (1990). And third, physical lineups are not rendered impermissibly suggestive merely because defendant was the only person in the lineup whose photograph was previously shown to a person viewing the lineup. *People v. Johnson,* 149 Ill. 2d 118, 148, 594 N.E.2d 253 (1992); *People v.Curtis,*

262 Iii. App. 3d 876, 883-84, 635 N.E.2d 860 (1994). Therefore, under the totality of the circumstances, defendant has failed to meet his burden of establishing that the photo-array and lineup procedures were unnecessarily suggestive or that there was a substantial likelihood of misidentification.

Defendant next contends that the eyewitness identification evidence against him was so untrustworthy, vague and incredible that it was insufficient to sustain his conviction for murder beyond a reasonable doubt. The State responds that the identification evidence supported the trial court's guilty verdict.

When a defendant challenges the sufficiency of the evidence, the relevant question is whether after viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam,* 172 Ill. 2d 484, 515, 670 N.E.2d 606 (1996). A criminal conviction will not be set aside on review unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *People v. Eyler,* 133 Ill. 2d 173, 191, 549 N.E.2d 268 (1989). In order to sustain a conviction, one of the elements that the prosecution must prove beyond a reasonable doubt is that the defendant was the perpetrator of the charged crime. *People v. Dante,* 35 Ill. 2d 538, 540, 221 N.E.2d 409 (1966); *People v. Daniels,* 331 Ill. App. 3d 380, 389-90, 770 N.E.2d 1143 (2002). The State can carry its burden of proving guilt through the testimony of a single, credible eyewitness, if the witness viewed the offender under circumstances permitting a positive identification. *People v. Smith,* 299 Ill. App. 3d 1056,

1061, 702 N.E.2d 218 (1998); *People v. McAfee,* 332 Ill. App. 3d 1091, 1096, 774 N.E.2d 469 (2002). Nonetheless, "'[e]yewitness testimony under the best of conditions is subject to all of the frailties of human perception.'" *People v. Hernandez,* 312 Ill. App. 3d 1032, 1037, 729 N.E.2d 65 (2000). And our supreme court has recognized that "'[o]f all the factors that account for the conviction of the innocent, the fallibility of eyewitness identification ranks at the top, far above all the others.'" See *People v. Gardner,* 35 Ill. 2d 564, 571, 221 N.E.2d 232 (1966).

The general rule is that a conviction cannot be sustained beyond a reasonable doubt by the evidence if the witness's identification of the defendant is vague, doubtful and uncertain. *People v.* Ash, 102 Ill. 2d 485, 494, 468 N.E.2d 1153 (1984); *People v. Cullotta,* 32 Ill. 2d 502, 504, 207 N.E.2d 444 (1965). The United States Supreme Court in *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972), set forth five factors to be considered in evaluating the reliability of an eyewitness identification: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. Illinois courts use the same five-factor test in determining whether the identity of the accused has been proven beyond a reasonable doubt. See *People* v. *Slim,* 127 Ill. 2d 302, 307-08, 537 N.E.2d 317 (1989).

In a bench trial, the trial judge determines the reliability of an eyewitness' identification testimony. *Smith,* 299 Ill. App. 3d at 1061-62. In the State's closing argument, the prosecutor stated, that this case "boils down to identification." However, here, there is no indication whether or not the trial judge assessed the credibility of the eyewitnesses, resolved conflicts in their testimony, or weighed the evidence or drew reasonable inferences therefrom. After hearing all the evidence and closing arguments, the trial judge remarked:

"I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [defendant] knew he was a drug dealer. [Defendant] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." Nevertheless, despite the trial judge's comments, in a bench trial, it is presumed that the trial judge considered only competent evidence in reaching his verdict. *People v. Worlds,* 80 Ill. App. 3d 628, 631, 400 N.E.2d 85 (1980).

The State attempts to justify the trial judge's comments by arguing that the comments were based upon the evidence. Specifically, the State contends that the trial judge could have reasonably concluded that the murder involved a dispute over illegal drugs since prior to the attack, Nelson was seen approaching vehicles in a liquor store parking lot, presumably to solicit drug sales, and after the attack Nelson was found with 40 bags of crack cocaine in his coat pocket. In addition, at oral argument, the State argued that the trial judge could have inferred that Nelson's homicide was the result of a dispute over

illegal drugs based on the "style" of the assault and murder, which the State contended was akin to an execution. However, there was no evidence presented that defendant knew Nelson was dealing drugs, and there was no evidence presented that defendant was involved with gangs or the illegal drug trade. The State further argues that even if this court determines that the trial judge's comments were improper, the comments should be deemed harmless since there is no indication that the comments constituted a material factor in defendant's conviction.

In the present case, defendant's conviction rests upon the eyewitness testimony of Johnnie and Evans, each of whom separately identified defendant as Nelson's assailant. It is true that Johnnie and Evans contradict each other on some points regarding the event,[2] and the reliability of Evans' testimony is severely called into question.[3] Nevertheless, Johnnie's

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[2] Evans testified that two men approached Nelson, one of whom beat Nelson with a bat and afterwards both men ran away from the scene. Johnnie testified, however, that Nelson was approached by only one individual who beat him, and afterwards this individual walked away from the scene.

[3] Evans' testimony was weakened by the fact that at trial he twice misidentified defendant's photograph in the photo-array, even though he testified that he recognized defendant from the neighborhood. Moreover, Evans' testimony was further weakened by the fact that during the trial he was in custody, and in exchange for his trial testimony the State agreed to recommend a sentence of probation on a pending drug charge and to recommend a recommitment of probation on an old drug charge. See *People v. Anthony Roy W.*, 324 Ill. App. 3d 181, 187, 754 N.E.2d 866 (2001) (stating that evidence that witness has pending charges or is in State custody is relevant to the witness's credibility as it tends to show the testimony may be influenced by bias, interest or motive to lie).

identification testimony is reliable and sufficient enough to support the trial court's guilty verdict. A single witness' identification of the accused is sufficient to sustain a conviction, if the witness had ample opportunity to observe the accused under circumstances permitting a positive identification. *People v. Denton,* 329 Ill. App. 3d 246, 251, 767 N.E.2d 879 (2002). Moreover, despite the contradictions between their testimony, both Johnnie and Evans put defendant at the scene of the crime and both identify defendant as Nelson's assailant. There is no evidence that Johnnie and Evans knew each other or had any reason to conspire and fabricate their testimony. Therefore, in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error. That being said, we remind the trial court that in a case such as this, where there is no physical evidence linking defendant to the crime and the identity of the perpetrator of the charged crime is at issue and defendant's conviction rests upon eyewitness identification testimony -- every effort should be made to assess the credibility of the eyewitnesses, resolve any conflicts in their testimony, weigh the evidence and draw reasonable inferences therefrom.

In the present case, in regard to Johnnie's eyewitness testimony as it related to the five *Biggers* identification factors, the evidence indicated that his testimony was reliable. For example, the evidence indicated that Johnnie had an adequate opportunity to view defendant during the attack on Nelson. Johnnie testified that the incident occurred just a few feet away from where he sat in his car. He testified that the area in front of the liquor store where the

attack occurred was well-lit, and that he saw defendant's face just before the attack occurred and after defendant turned to leave.

The evidence indicated that Johnnie's degree of attention was high. Johnnie testified that Nelson had just spoken to Johnny Morgan who was also sitting in the car and he described how Nelson rode off and attempted to turn his bicycle around just before defendant caught-up with Nelson and beat him with the bat. The evidence revealed that Johnnie's prior description of defendant was generally accurate. Johnnie testified that he told detective White that defendant was a large black male, approximately 6'2" to 6'4," weighing about 220 to 240 pounds, dressed in brown. At the hearing on defendant's motion to quash his arrest, he admitted that he is approximately 6'2" and that on the date of his arrest, he weighed about 235 pounds. In addition, Johnnie's testimony that defendant was dressed in brown on the date of the occurrence, is corroborated by Evans' testimony that defendant was a large black male, dressed in brown or tan.

The evidence indicated that Johnnie expressed a high level of certainty at the identification confrontation. At trial, he identified defendant as the individual who assaulted Nelson on September 22, 1999. And unlike Evans, at trial, Johnnie did not misidentify defendant's photograph in the photo-array.

The length of time between the assault and Johnnie's confrontation identification was only six days. Johnnie testified that on September 28, 1999, six days after Nelson was assaulted, he went to the

Markham police station where he identified defendant in a photo-array as the individual who attacked Nelson on September 22, 1999. In addition, Johnnie testified that on October 27, 1999, a day after defendant was arrested on the traffic violation, he went to the police station where he identified defendant in a physical lineup as the individual who attacked Nelson on September 22, 1999. Even though there is no time limit beyond which an identification will cease to be reliable, a substantial length of time between the occurrence and the witness' identification diminishes the reliability of the identification. See People v. Barney, 60 Ill. App. 2d 79, 80-81, 208 N.E.2d 378 (1965) (pointing out six month lapse between the occurrence and the witness's identification); *People v. Reese,* 14 Ill. App. 3d 1049, 1053, 303 N.E.2d 814 (1973) (noting two month lapse between the incident and the identification); *People v. Ford,* 195 Ill. App. 3d 673, 677, 553 N.E.2d 33 (1990) (noting one year separation between undercover narcotics buy and identification, and defendant's arrest). Considering the totality of the circumstances, Johnnie's identification of defendant was reliable.

Defendant also contends that he was denied effective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the assistance of counsel. U.S. Const., amend. VI. This amendment requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). A two-pronged test for determining an ineffective assistance of counsel claim was established in. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984), and followed by Illinois in *People v. Albanese,* 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). In order for a defendant to obtain a reversal of a conviction based on an ineffective assistance of counsel claim, the defendant must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant, that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White,* 322 Ill. App. 3d 982, 985, 751 N.E.2d 594 (2001).

The "benchmark" in determining whether there has been ineffectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 696, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. A reviewing court must evaluate counsel's performance from counsel's perspective considering the circumstances at the time of trial, without the distorting effects of hindsight, and defendant must overcome the strong presumption that challenged action might be considered sound trial strategy. *People v. Garza,* 180 Ill. App. 3d 263, 268, 535 N.E.2d 968 (1989).

Defendant contends that he was denied effective assistance of counsel on the grounds that defense counsel failed to move for the suppression of the identification evidence, failed to investigate the case or call witnesses favorable to the defense, and failed to call him to testify on his own behalf. We must reject each of defendant's contentions.

In order to establish that trial counsel was ineffective for failing to file a motion to suppress evidence, the defendant must show that a reasonable probability exists that both the motion would have been granted and that the outcome of the trial would have been different if the evidence had been suppressed. *People v. Robinson,* 299 Ill. App. 3d 426, 434, 701 N.E.2d 231 (1998); *People v. Orange,* 168 Ill. 2d 138, 153-54, 659 N.E.2d 935 (1995). As previously noted, the record indicates that no factual bases existed to suppress the identification evidence obtained in the photo-array or physical lineup. Therefore, defense counsel's failure to file a motion to suppress was not prejudicial to defendant.

To prevail on a claim of ineffective assistance of counsel based on the failure to investigate, a defendant must show that substantial prejudice resulted and that the outcome of the trial would have been different had counsel properly investigated. *Orange,* 168 Ill. 2d at 151. Defendant points to nothing in the record which indicates that defense counsel failed to investigate this case. Consequently, defendant's contention that defense counsel was ineffective for failing to investigate this case is without basis.

Finally, defendant contends that defense counsel was ineffective for failing to call him to testify on his own behalf. The State responds that defendant's contention should be rejected because decisions regarding which witnesses to call at trial and what evidence to present, are matters of trial strategy. The State is incorrect regarding its strategy argument, because a criminal defendant's right to testify at trial is a fundamental right, which is

generally not a matter of trial strategy. See *People v. Steward*, 295 Ill. App. 3d 735, 743, 693 N.E.2d 436 (1998). Nonetheless, defendant's contention on this issue must be rejected. There is no indication in the record showing that defendant ever expressed a desire to testify or that defense counsel frustrated defendant's request to testify.

Finally, defendant contends that his 25-year sentence for first-degree murder is excessive and shows that the trial court failed to consider his rehabilitative potential, in light of his lack of prior convictions, educational background, and employment record. Defendant has waived this argument for review because he did not include the sentencing issue in his post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). Waver aside, under the facts in this case, a reduction in defendant's sentence would be unwarranted.

Imposition of a sentence is a matter of judicial discretion that will not be disturbed absent an abuse of that discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153, 368 N.E.2d 882 (1977). In addition, where a defendant's sentence is within statutory limits, a reviewing court will not alter the sentence absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494, 508 N.E.2d 708 (1987). Moreover, in determining an appropriate sentence, the nature of the crime, the protection of the public, deterrence and punishment are all relevant as well as defendant's potential for rehabilitation. *People v. Trimble*, 220 Ill. App. 3d 338, 355, 580 N.E.2d 1209 (1991).

In the instant case, defendant's sentence was within the applicable statutory range. Defendant was

sentenced to 25 years' imprisonment for first-degree murder. The statutory range for first-degree murder is 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1) (West 1996). Thus, defendant's sentence is 5 years above the minimum for his crime. Where an imposed sentenced is within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or manifestly violates constitutional guidelines; the spirit and purpose of the law are promoted when a sentence reflects the seriousness of the crime and gives adequate consideration to defendant's rehabilitative potential. *People v. BoClair,* 225 Ill. App. 3d 331, 335, 587 N.E.2d 1221 (1992).

In the present case, there is nothing in the record which indicates that the trial judge ignored defendant's rehabilitative potential or any mitigating factors before he imposed his sentence. The record indicates that at defendant's sentencing, the trial judge acknowledged the presentence investigation report, which raises the presumption that the trial court took into account defendant's potential for rehabilitation. *People v. Wilburn,* 263 Ill. App. 3d 170, 185, 635 N.E.2d 877 (1994). Immediately prior to imposing sentence, the trial judge acknowledged that for an individual without a history of criminal behavior, prison would not be an easy place to live. But the trial judge went on to state that based on the severity of the assault and on the victim's young age, a 25-year sentence of imprisonment was warranted. The record shows that the trial judge considered both mitigating and aggravating factors and arrived at a balance between society's need for protection and defendant's rehabilitative potential.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

HALL, J., with WOLFSON, J., concurring.

Presiding Justice South, dissenting:

Respectfully, I must dissent. While I agree with the majority that the motion to suppress was properly denied, I disagree with its conclusion that the trial court's statement regarding defendant's "motive" in committing the crime was harmless error.

It is axiomatic that in a bench trial, it is for the trial judge to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Slim*, 127 Ill. 2d 302 (1989). Admittedly, we do have the testimony of two eyewitnesses. However, the majority glosses over the very troubling fact that Evans identified the wrong photograph at trial, even after repeated attempts by the prosecutor to correct the error. What's more troubling about his testimony is that he is the one witness who claimed he had seen defendant on a number of occasions in the liquor store and knew him by sight. His misidentification was never corrected. Therefore, I find his testimony to be doubtful and highly suspect, especially in light of the fact that he had entered into an agreement with the prosecutor to be re-committed to probation on a drug delivery charge in exchange for his testimony.

Maurice Johnnie testified that he saw the beating from a few feet away and observed the assailant under very stressful circumstances within a brief time span. I might be persuaded, however, that his single identification would be sufficient to convict if it were not for the fact that the court never stated that he relied on that identification or other properly admitted evidence.

Instead, the record affirmatively demonstrates that the court reached its verdict solely based upon defendant's purported motive. When a judge sits as the trier of fact in a bench trial, the judge is presumed to have considered only competent evidence presented by the parties at trial. See *People v. Gilbert*, 68 Ill. 2d 252, 258, 369 N.E.2d 849 (1977); *Buckner v. Causey*, 311 Ill. App. 3d 139, 145 (1999); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590 (2000).

The presumption that the trial court considered competent evidence is rebutted only when it affirmatively appears that: (1) the court considered inadmissible evidence; and (2) that the court was misled or improperly influenced thereby. *People v. Barnes*, 48 Ill. App. 3d 226, 229 (1977). In the instant case that presumption has been clearly and undeniably rebutted. Even the majority cannot deny that the trial court considered matters outside the trial record. The trial court stated that all of the witnesses "skirted the real issue" which was that the victim was "a drug dealer," and that defendant wanted to "knock him off," even though not one scintilla of evidence was presented that the victim was selling drugs at the time of the murder or that defendant knew he was a drug dealer and wanted to "knock him off." What we do have is a trial court

manufacturing, supplying, and interjecting its own evidence into a trial and then affirmatively stating on the record that this manufactured evidence constituted the basis of its verdict. I fail to comprehend how such conduct can be regarded as "harmless error."

Because the eyewitness identification was marginal at best and because the court said that it only considered unsupported insinuations without any indication that he was aware of this impropriety, it is my opinion that justice and fundamental fairness demand that defendant be afforded a new trial free from such prejudice. See *People v. Nuccio*, 43 Ill. 2d 375 (1969).